TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1912.

No. 736.

THE UNITED STATES, APPELLANT,

vs.

THE MILLE LAC BAND OF CHIPPEWA INDIANS IN THE STATE OF MINNESOTA.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 29, 1912.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1912.

No. 736.

THE UNITED STATES, APPELLANT,

vs.

THE MILLE LAC BAND OF CHIPPEWA INDIANS IN THE STATE OF MINNESOTA.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Caption	1	1
Petition filed	1	1
Amended petition	2	1
Traverse	9	6
History of proceedings	10	6
Argument and submission of defendants' and claimants' motions for new trial	10	6
Orders of court on said motions	10	7
Findings of fact	11	7
Conclusion of law	21	18
Opinion by Booth, J	21	18
Dissenting opinion by Peelle, Ch. J	42	41
Dissenting opinion by Howry, J	45	45
Judgment of the court	55	56
Application for and allowance of appeal	56	56
Certificate of clerk	57	56

54703—12——1

1 I. *Petition and amended petition.*

Court of Claims.

THE MILLE LAC BAND OF CHIPPEWA INDIANS IN THE State of Minnesota *vs.* THE UNITED STATES. } No. 30447.

The claimants filed their original petition in this court on May 28, 1909.

Subsequently, to wit, on March 1, 1911, by leave of court, the fourth paragraph of said petition was amended by substituting a new paragraph therefor.

Said petition, as amended, is as follows:

2 In the Court of Claims.

THE MILLE LAC BAND OF CHIPPEWA INDIANS IN THE State of Minnesota *vs.* THE UNITED STATES. } No. 30447.

PETITION.

To the honorable Chief Justice and the Associate Justices of the Court of Claims of the United States:

Your petitioner, the Mille Lac Band of Chippewa Indians in the State of Minnesota, respectfully represents:

First.

That this petition is filed and the jurisdiction of this court invoked under and by virtue of the provisions of an act of Congress known as "An act for the relief of the Mille Lac Band of Chippewa Indians in the State of Minnesota and for other purposes" (Public No. 226), approved February 15, 1909, which provides as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Court of Claims be, and it is hereby, given jurisdiction to hear and determine a suit or suits to be brought by and on behalf of the Mille Lac Band of Chippewa Indians in the State of Minnesota against the United States on account of losses sustained by them or the Chippewas
3 of Minnesota by reason of the opening of the Mille Lac Reservation in the State of Minnesota, embracing about sixty-one thousand acres of land, to public settlement under the general land laws of the United States; and from any final judgment or decree of the Court of Claims either party shall have the right to appeal to

the Supreme Court of the United States, and the said cause shall be advanced on the docket of the Court of Claims and of the Supreme Court of the United States if the same shall be appealed: Provided, That upon the final determination of such suit or suits the Court of Claims shall have jurisdiction to decree the fees to be paid to the attorney or attorneys employed by the said Mille Lac Band of Indians, and the same shall be paid out of any sum or sums found due said band or to the Chippewa Indians of Minnesota.

"Approved, February 15, 1909."

Your petitioner is the identical Mille Lac Band of Chippewa Indians in the State of Minnesota referred to in the foregoing act, and no transfer of its claim or of any part thereof or of any interest therein has been made.

Second.

Your petitioner now submits to this honorable court for adjudication its claim against the United States on account of losses sustained by reason of the opening of the Mille Lac Reservation in the State of Minnesota to public settlement under the general land laws of the United States.

Third.

Your petitioner alleges that, pursuant to a treaty made between the Mississippi Pillager and Lake Winnibigoshish Bands of Chippewa Indians and the United States, concluded at the city of Washington on the twenty-second day of February, A. D. 1855 (10 Stat. L., 1165), the following described fractional townships and islands, to wit:

4 Fractional townships forty-two north, of range twenty-five west, forty-two north, of range twenty-six west, and forty-two and forty-three north, of range twenty-seven west, and also three islands in the southern part of Mille Lac Lake, all in the State of Minnesota, covering an area of sixty-two thousand and fourteen (62,014) acres, known as the Mille Lac Indian Reservation, was reserved and set apart for the permanent homes for the members of the Mississippi Bands of the Chippewa Indians in the State of Minnesota. Your petitioner, the Mille Lac Band, is one of the said Mississippi Bands of Indians therein named. A copy of the said treaty of February 22, 1855, is hereto attached, marked "Exhibit A" and made a part of this petition, to which reference is asked.

It was expressly agreed and understood by and between the said Mississippi Bands of Chippewa Indians and the United States that the lands above described should be eventually allotted to the said Indians, and it was provided in article two of said treaty that at such time or times as the President might deem it advisable for the interest and welfare of said Indians or any of them he should cause said reservation or such portion or portions thereof as might be necessary, to be surveyed and assigned to each head of family or single person over twenty-one years of age, a reasonable quantity of land in one body, not to exceed eighty acres in any case, for his or her separate

use, and that he might in his discretion, as the occupants thereof should become capable of managing their business and affairs, issue patents to them for the tracts so assigned to them, respectively.

Your petitioner alleges that long before the commission of the wrongful acts by the United States as hereinafter complained, the said Indians entitled to allotments on said Mille Lac Reservation were capable of managing their business and affairs, and it was for the interest and welfare of said Indians that they be allotted lands on said reservation, pursuant to said treaty; but, notwithstanding the aforesaid facts, the United States, by its administrative officers, has violated the spirit and letter of said treaty, and has continually refused and neglected to allot said lands to the members of the said Mille Lac Band of Indians or any of them, or to any Indian of said Mississippi Bands of Chippewa Indians.

5 Fourth (as amended).

That thereafter and during the year 1862 the said Mille Lac Band of Chippewa Indians offered its services to the United States to aid in suppressing the outbreak during that year of the Sioux and Chippewa Indians. That it was due largely to the aid so furnished the Government by claimants that the hostile Indians were dispersed and prevented from further interfering with or molesting the persons or property of the whites living in the State of Minnesota.

That on March 11, 1863, the United States made and concluded a treaty with the Mississippi Bands of Chippewa Indians in the State of Minnesota, including the Mille Lac Band, and by said treaty all right, title, and interest of the Gull Lake Band, the Sandy Lake Band, the Rabbit Lake Band, the Pokagomin Lake Band, and the Rice Lake Band, in and to the Mille Lac Reservation was vested in the Mille Lac Band, claimants herein, and by the 12th article of the said treaty, the United States reserved for and to the said Mille Lac Band the exclusive ownership and right to occupy the same, and therein stipulated and agreed with the said Mille Lac Band that, owing to their former good conduct, they should not be compelled to remove from the said reservation so long as they did not in any way interfere with or in any manner molest the persons or property of the whites.

A copy of the said treaty of March 11, 1863 (12 Stat. L., 1249), is hereto annexed, marked Exhibit B, and made a part of this petition, to which reference is asked.

Your petitioner further alleges that another treaty between the United States and the said Mississippi bands of Chippewa Indians was concluded at the city of Washington on May 7, 1864 (13 Stat. L., 693), by which the provisions of the above mentioned treaty of 1863 were solemnly reaffirmed and the exclusive right of the Mille Lac Band of Indians in and to the said Mille Lac Reservation was by the 12th article thereof again declared and confirmed; and it was once more distinctly understood and agreed, between the parties to the

said treaty, that the said Mille Lac Band of Indians, claimants herein, should not be compelled to remove from the said reservation so long as they did not in any way interfere with, or in any manner molest, the persons or property of the whites.

A copy of said treaty of May 7, 1864, is hereto attached, marked Exhibit C, and made a part of this petition, to which reference is asked.

Your petitioner further alleges that this said Mille Lac Band of Chippewa Indians, and the individual members thereof, have never at any time, in any way, interfered with, or in any manner molested, the persons or property of the whites, but have, in all respects, carefully kept, observed, and maintained their agreements and obligations under the said treaties.

6 Fifth.

Your petitioner further alleges that the Congress of the United States, still recognizing the rights of the said Mille Lac Band of Chippewa Indians to the said lands hereinbefore described, passed an act entitled "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota" (25 Stat. L., 642), approved January 14, 1889, and by section three of said act it was provided that any of the Indians residing on any of said reservations (which included the Mille Lac Reservation) might in his discretion take his allotment on the reservation where he resided at the time of the removal therein provided for instead of being removed to and taking such allotment on the White Earth Reservation. A copy of said act of January 14, 1889, is hereto attached, marked "Exhibit D," and made a part hereof, and to which attention is asked.

Sixth.

Your petitioner further alleges that there was embraced in said Mille Lac Indian Reservation one of the most valuable white-pine forests in the United States, and that notwithstanding the said treaties and statute hereinabove referred to and in violation thereof the United States through its Land Department wrongfully and unlawfully at various times between the year eighteen hundred and seventy and the first day of January, nineteen hundred and six, inclusive, appropriated and disposed of said lands upon said Mille Lac Indian Reservation by opening the same to public settlement and entry under the general land laws of the United States and did dispose of all of said reservation with the exception of about 160 acres of land.

Seventh.

Your petitioner further alleges that the lands on said Mille Lac Indian Reservation were never disposed of under and pursuant to the act of January 14, 1889, nor the timber thereon, as therein pro-

vided, but in truth and in fact all of said Mille Lac Indian Reservation was opened to public settlement and entry and disposed of under the general land laws of the United States and in accordance therewith (excepting said 160 acres) without authority of Congress, and in violation of the legal rights of your petitioner.

Eighth.

Your petitioner further alleges that the value of said lands so appropriated and disposed of as aforesaid, with the valuable pine timber standing thereon, was then and there of the reasonable value of at least three million dollars. And your petitioner further alleges that by reason of the opening of the Mille Lac Reservation to public settlement and entry under the general land laws of the United States as aforesaid, your said petitioner has sustained losses and damages in the sum of at least three million dollars; and your petitioner sets forth that it is justly entitled to said amount.

7 The premises considered, your petitioner prays:

1. That it be adjudged and decreed that your petitioner was the owner of and entitled to the possession of the lands herein described and known as the Mille Lac Indian Reservation in the State of Minnesota, containing about sixty-two thousand and fourteen acres.

2. That it be further adjudged and decreed that while your petitioner was the owner of and entitled to the possession of the lands herein described, the same, with the exception of about 160 acres were wrongfully and unlawfully opened to public settlement and entry and disposed of by the Interior Department of the United States and its officers, in violation of the rights of your said petitioner and without authority of law.

3. That it be adjudged and decreed that your petitioner has sustained losses and damage by reason of said unlawful disposal of said lands in the sum of at least three million dollars.

4. That it be further adjudged and decreed that your petitioner have judgment against the United States in the sum of three million dollars and interest.

5. That your petitioner may have such other and further relief as justice and equity may require.

MILLE LAC BAND OF CHIPPEWA INDIANS,
IN THE STATE OF MINNESOTA,
Petitioner.

GEORGE B. EDGERTON,
Attorney for Petitioner.
C. E. RICHARDSON,
Of Counsel.

DISTRICT OF COLUMBIA, *ss:*

George B. Edgerton, being first duly sworn, deposes and says that he is the duly authorized attorney for the Mille Lac Band of

8 Chippewa Indians in the State of Minnesota, the party named

in the foregoing petition; that he is duly authorized and empowered by the said claimant to prosecute this suit; that the matters alleged in said petition are true, to the best of his knowledge and belief.

GEORGE B. EDGERTON.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 28th day of May, A. D. 1909.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

9 II. *Traverse. Filed March 1, 1911.*

In the Court of Claims of the United States. December term, A. D. 1911.

THE MILLE LAC BAND OF CHIPPEWA INDIANS
vs.
THE UNITED STATES. } No. 30447.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney General.

10 III. *History of proceedings.*

On March 1, 1911, this cause came on to be heard. Messrs. George B. Edgerton and F. W. Houghton were heard for the claimants and Mr. George M. Anderson was heard in opposition. On March 2, 1911, Mr. Anderson was heard further for the defendants, Mr. Houghton replied, and the case was submitted.

On May 29, 1911, the court filed findings of fact and conclusion of law and entered judgment for claimants in the sum of $764,210.89, with an opinion by Booth, J., Howry, J., reserving his opinion.

On July 24, 1911, the defendants made a motion for a new trial.

On August 23, 1911, the claimants made a motion for a rehearing and to amend findings of fact. On December 11, 1911, by leave of court, the claimants withdrew their motion for a rehearing.

IV. *Argument and submission of defendants' and claimants' motions for new trial.*

On January 22, 1912, these motions came on to be heard. Mr. Anderson was heard in support of defendants' motions for a new trial; Mr. George B. Edgerton and Mr. Daniel B. Henderson were heard in support of the claimants' motion for a new trial; Mr. F. W. Houghton was also heard for the claimants' motion, and the motions were submitted.

V. *Orders of said motions. Filed May 6, 1912.*

The defendants' motion for a new trial is overruled. The claimants' motion to amend findings is allowed in part and overruled in part, and amended findings and modified opinion this day filed. The former judgment is vacated and set aside and judgment now entered on the findings for the claimants in the sum of $827,580.72. Opinion by Booth, J. Dissenting opinions by Peelle, Ch. J., and Howry, J.

11 *VI. Findings of fact and conclusion of law. Opinion by Booth, J. Dissenting opinions by Peelle, Ch. J., and Howry, J. Filed May 6, 1912.*

THE MILLE LAC BAND OF CHIPPEWA INDIANS IN THE STATE OF MINNESOTA

v.

THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of fact:

I.

This claim was referred to the court by an act of Congress entitled "An act for the relief of the Mille Lac Band of Chippewa Indians in the State of Minnesota, and for other purposes," approved February 15, 1909 (35 Stat. L., 619), which reads as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Court of Claims be, and it is hereby, given jurisdiction to hear and determine a suit or suits to be brought by and on behalf of the Mille Lac Band of Chippewa Indians in the State of Minnesota against the United States on account of losses sustained by them or the Chippewas of Minnesota by reason of the opening of the Mille Lac Reservation in the State of Minnesota, embracing about sixty-one thousand acres of land, to public settlement under the general land laws of the United States; and from any final judgment or decree of the Court of Claims either party shall have the right to appeal to the Supreme Court of the United States, and the said cause shall be advanced on the docket of the Court of Claims and of the Supreme Court of the United States if the same shall be appealed: *Provided*, That upon the final determination of such suit or suits the Court of Claims shall have jurisdiction to decree the fees to be paid to the attorney or attorneys employed by the said Mille Lac Band of Indians, and the same shall be paid out of any sum or sums found due said band or to the Chippewa Indians of Minnesota."

II.

September 30, 1854 (10 Stat. L., 1109), the United States entered into a treaty with the Chippewa Indians of Lake Superior and the Mississippi.

12 On February 22, 1855, the United States entered into a treaty with the Gull Lake, Mille Lac, Sandy Lake, Pokagomin Lake, Rabbit Lake, and Rice Lake Bands of Indians, known as the Chippewas of the Mississippi, and the Pillager and Lake Winnibigoshish Bands of Chippewas. This treaty secured to the United States a cession of all the lands belonging to the various bands of Indians mentioned in the State of Minnesota, and set apart for them specific reservations mentioned in the treaty. The reservation set apart for the Mille Lac Indians embraced the following fractional townships: 42 north of range 25 west; 42 north of range 26 west, and 42 and 43 north of range 27 west, and also the three islands in the southern part of Mille Lac, containing 61,028.14 acres of land.

Article 3 of said treaty further provided for the payment to said Mississippi Chippewas of $10,000 in goods to be distributed among their people; also $50,000 in money to enable them to adjust and settle their present engagements, subject to the approval of the Secretary of the Interior; also $20,000 " per annum, in money, for 20 years, provided that $2,000 per annum of the sum shall be paid or expended, as the chiefs may request, for purposes of utility connected with the improvement and welfare of said Indians, subject to the approval of the Secretary of the Interior "; also $5,000 for the construction of a road from Rum River to said Mille Lac Reservation, and a reasonable quantity of land to be plowed and prepared for cultivation in suitable fields at each of the reservations so set apart, not exceeding in the aggregate 300 acres.

Article 4 provided that the Mississippi Bands should be permitted to employ their own farmers, mechanics, and teachers, and that the amounts heretofore granted them under former treaties for blacksmiths, tools, farmers, carpenters, etc., should be paid to them as their annuities are paid.

The lands set aside as the Mille Lac Reservation were lands which had been ceded to the Government by the treaty of July 29, 1837 (7 Stat L., 536).

III.

Prior to August, 1862, the Sioux Indians of Minnesota and the Northwest were hostile to the United States, and engaged in massacres and other open hostilities toward the people of the State and vicinity. The cause of the Sioux uprising was a universal opinion pervading the entire tribe that the Government had not in good faith complied with its treaty stipulations; the Indians were displeased with the conduct of the Indian traders; they charged unfair payments of annuities and were distinctly hostile to the whole system

and management of their affairs, as it then prevailed. The Sioux outbreak was extensive, atrocious, and terrible in its consequences. At its inception a series of negotiations were had with Hole-in-the-Day, chief of the Chippewas, to induce him and his tribe to join in the war. The Chippewas could furnish 4,000 fighting men, which added to the then hostile Sioux, would have made a total of 5,300 armed and desperate Indians. Hole-in-the-Day was in sympathy with the hostilities; the Chippewas were generally discontented for the same reasons which impelled the Sioux. While they had
13 theretofore been hostile to the Sioux, the prior hostility was to a considerable extent lost in what the Indians termed their mutual grievances against the Government. Little Crow, chief of the Sioux, endeavored more than once to induce Hole-in-the-Day to join forces with him and annihilate the whites, and the union of their forces was the subject of grave concern to Gov. Ramsay, Commissioner Dole, and all others in authority. Negotiations, concessions, and peaceful overtures were unhesitatingly extended to the Chippewas on behalf of the United States to secure their loyalty. The union was successfully prevented by the conduct of the Mille Lac Indians, together with the Sandy Lake Band, in remaining loyal to the United States.

Shaw-vosh-kung, the chief of the Mille Lac Band of Chippewas, refused to participate in the movement of Chief Hole-in-the-Day, and proceeded with 800 of his band to the relief of Fort Ripley, where Commissioner Dole of the Indian Office and 35 United States soldiers were located. He was advised by Commissioner Dole to return to his reservation, persist in his loyalty to the Government, and use his efforts to induce Hole-in-the-Day to resume a peaceful attitude toward the people. The chief of the Mille Lac Band, by reason of his refusal to augment the forces of Hole-in-the-Day, and his open demonstrations of loyalty to the Government, prevented the uprising contemplated by Hole-in-the-Day and caused the bands to remain at peace.

This was the "heretofore good conduct" constituting the consideration for the proviso to article 12 of the treaties of 1863 and 1864 hereinafter mentioned.

IV.

In March, 1863, Commissioner Dole, in company with the headmen and chiefs of the Chippewa Bands, came to Washington, D. C., and on March 11, 1863, procured their assent to another treaty. (12 Stat. L., 1249.)

This treaty between the Chippewas of the Mississippi and the United States provided in terms for the cession to the United States of the reservations set apart to them under the treaty of 1855, except one-half section of land which was granted in fee simple to a missionary.

Article 2 of the treaty provided for the setting apart to the said Chippewas of the Mississippi the reservation which thereafter under subsequent changes in boundary limits made by the treaty of March 19, 1867 (16 Stat. L., 719), became known as the White Earth Reservation, which was 150 miles distant from the reservation set aside to the Mille Lac Indians by the treaty of 1855.

Article 3 of the treaty provided for the extension of the present annuities of the Indians parties thereto for 10 years beyond the time mentioned in existing treaties; to pay toward the settlement of claims for depredations committed by the Indians in 1862, $20,000; to pay to the chiefs of the Chippewas, $14,000; and to pay the expenses incurred by the Legislature of the State of Minnesota in September, 1862, in sending commissioners to visit the Chippewa Indians, $1,338.75.

Article 4 provided for the expenditure of $3,600 in clearing and rendering susceptible to cultivation a certain amount of land
14 on each reservation. For the Mille Lac Band 70 acres was to be so cleared, and out of this sum they were to build for the chiefs of each of said bands a house of a certain description.

Article 5 provided for the expenditure of $1,000 in the procurement of agricultural implements and tools specifically mentioned, and the employment of two carpenters, two blacksmiths, four farm laborers, and one physician.

Article 6 provided for the erection and maintenance of a sawmill at a certain place on the reservation and the removal of the agency to a certain place mentioned therein.

Article 12 provided as follows:

"It shall not be obligatory upon the Indians parties to this treaty to remove from their present reservations until the United States shall have first complied with the stipulations of articles 4 and 6 of this treaty, when the United States shall furnish them with all necessary transportation and subsistence to their new homes, and subsistence for six months thereafter: Provided, That, owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites."

V.

On the 7th day of May, 1864, in the city of Washington, D. C., the United States entered into another treaty with the Mississippi Chippewas (13 Stat. L., 693), which treaty was substantially the same as the treaty of March 11, 1863, before mentioned.

Article 1 of this treaty granted one section of land each to Chiefs Hole-in-the-Day, Mis-qua-dace, and Shaw-vosh-kung.

Article 2 of the treaty continued the White Earth Reservation, changing somewhat its former description.

The provisions of article 3 of the treaty were similar to those of article 3 of the treaty of 1863, simply extending the payment of the

annuities and the sums therein mentioned for the period of 10 years from the date of the treaty of 1864, and providing $5,000 to be paid to Chief Hole-in-the-Day for the burning of his house and furniture in 1862.

Article 4 of the treaty was the same as article 4 of the treaty of 1863 except a provision for the payment of $7,500 for clearing, grubbing, and planting the amount of land on the reservations mentioned in the same article of the former treaty, and increasing the amount to be expended for the houses to be built for the chiefs to $5,000.

Article 5 of this treaty was the same as article 5 of the treaty of 1863 except as to the amount, $1,500 being substituted for $1,000.

Article 6 of the treaty provided $1,000 for the support of the sawmill provided in the same article of the former treaty and to expend $7,500 on new roads and bridges, and $25,000 for new agency buildings to be located by the Secretary of the Interior for the common use of the Chippewas of the Mississippi.

Article 12 of the treaty was exactly the same as article 12 of the treaty of 1863, with an additional proviso as follows:

"That those of the tribe residing on the Sandy Lake Reservation shall not be removed until the President shall so direct."

15 VI.

At the time of the execution of the treaty of 1863 and 1864 by the Mille Lac Indians the said band of Indians understood and believed that they were reserving to themselves the right to occupy the Mille Lac Reservation set apart to them by the treaty of 1855.

On October 2, 1889, a council of the Mille Lac Indians assembled on the reservation set apart to them by the treaty of 1855, was addressed by Senator Henry M. Rice, one of the commissioners who participated in the procurement and execution of the treaty of 1863, who told the Mille Lac Indians that he knew that it was understood by them that they were reserving their reservation, that he so understood the meaning of the treaty and assisted in its negotiation with that intent. At the same time and place the chiefs and headmen of the Mille Lac Indians insisted and openly proclaimed that such was their intention in the execution of said treaty. (Ex. Doc. No. 247, H. R., 51st Cong., 1st sess., pp. 168–180.)

On October 9, 1886, at a council of the Mille Lac Indians on their reservation, held for the purpose of procuring their assent to the act of May 15, 1886 (24 Stat. L., 44), the Mille Lacs again publicly proclaimed to the commissioners sent by the Government that they intended by the treaties of 1863 and 1864 to reserve said reservation for themselves, and when it was represented to said Indians that they had not done so and their rights on said reservation were simply ones of favor and license and that they had ceded the same to the Government by the treaties of 1863 and 1864, which was supplemented by the following opinion of Secretary Lamar:

"In view of all the facts connected with the Mille Lac Indians and their reservation, the President hears with great surprise and disap-

pointment that they have refused to give their consent to remove to the White Earth Reservation, where they would be beyond the reach of avaricious white men, and where they would have good homes with peace and plenty. If they persist in remaining on their old reservation, they must do so at their own risk and with the disapprobation of the Government. It is the desire of the President that the commissioners explain fully to these Indians the condition of affairs; that they have ceded the lands of the Mille Lac Reservation to the United States, and are permitted to remain there only so long as they shall not in any way interfere with or molest the persons or property of the whites. The President desires that the commissioners shall make another effort to induce these Indians to remove to White Earth, where all the Chippewas will be united in one happy and prosperous family. The commission should say to them that it is the earnest desire of the President that they remove to White Earth, and that their interest, and that only, prompts the Government in urging them to take this step. The Indians should give the matter the most careful consideration, as the future welfare and happiness of themselves and children depends upon their decision in this matter,"

they declined further negotiations with the commissioners, withdrew from the council, terminated its existence, and refused their assent to the proposed legislation.

16 On November 3, 1886, at the same place, another attempt was made to secure their assent to the act of May 15, 1886, and the Indians again refused their assent thereto because of a dispute as to their title to the reservation, which they alleged to have reserved to themselves by the treaties of 1863 and 1864. (Ex. Doc. No. 115, Sen., 49th Cong., 2d sess., pp. 27-37.)

On May 27, 1902, Congress passed an act (32 Stat. L., 268) providing for the payment to the Mille Lac Indians of the sum of $40,000 for improvements made by them, or any of them, upon lands occupied by them on said reservation, being the same set apart to them by the treaty of 1855, the act providing for their assent thereto before any of said sum could be paid. The Mille Lac Indians declined the offer made under said act and refused to sign agreements assenting thereto until there was inserted in said agreement the following language: "It is understood that nothing in this agreement shall be construed to deprive the said Mille Lac Indians of any of the benefits to which they may be entitled under existing treaties or agreements not inconsistent with the provisions of this agreement or the act of Congress relating to said Indians approved May 27, 1902."

The said Mille Lac Indians have, without exception, upon all occasions and in connection with all controversies relating to the title they possessed to the reservation set apart to them by the treaty of 1855, proclaimed and persisted in their claim of the right of occupancy to said reservation and have continually and openly

occupied said reservation from that time until subsequent to the passage of the act of January 14, 1889.

VII.

Subsequent to the execution of the treaties of 1863 and 1864 said Mille Lac Indians protested to the defendants against squatters who were arbitrarily occupying certain portions of their reservation. In April, 1871, filings for homestead and preemption entries were made under the public-land laws, principally in soldiers' additional scrip, upon the lands of the Mille Lac Indian Reservation.

On August 22, 1871, the Indians complained to the Department of the Interior and protested against permitting white settlers to go upon their reservation, and in response to said protest said department, through its General Land Office, addressed a communication to the local land officer requesting that no part of said reservation should be considered as subject to entry and sale as public lands, and to give public notice to the effect that said settlements would be considered illegal.

On September 11, 1871, the Attorney General of the United States informed the department that he had instructed the United States district attorney to prosecute trespassers on the Mille Lac Reservation, and on September 21, 1871, the General Land Office requested the governor of Minnesota to execute a relinquishment of the State's claims to certain tracts within said reservation that had been patented to the State as swamp lands on the 13th of May, 1871.

Settlers were moved off the reservation by Agent Smith, of the General Land Office, and under date of November 13, 1871, said agent reported that after a personal examination of the situa-
17 tion made by going upon the reservation and diligent inquiry incident thereto, he came to the following conclusions:

"1. A large part of the free fractional townships that constitute the Mille Lac Reserve has been entered either by half-breed scrip or preemption claims.

"2. In all cases the claims selected are upon pine lands, in preference to hardwood lands, which are better adapted to agriculture.

"3. Nearly all the half-breed scrip, by reference to the report lately made by the commissioner, will be found to have been fraudulently obtained.

"4. The entries by preemption have been largely made by parties who were employed and paid by the day and sent up in gangs of from 6 to 35 men to make improvements, prove up at the land office, and then transfer their titles to their employers." (Report No. 1388, H. R., 60th Cong., 1st sess., pp. 6–7.)

VIII.

In April, 1871, 57 pieces of Chippewa half-breed scrip were located upon the reservation to the extent of 4,609.98 acres, and in June, July, and August of that year there were preemption claims filed to

the total amount of 6,416.44 acres, and at the same time 117 declaratory statements were filed covering several thousand additional acres.

On June 17 and 20, 1871, the Interior Department ordered the suspension of all entries made under article 10 of the treaty of 1854 and article 6 of the treaty of February 22, 1855, and directed the refusal of additional entries under either treaty.

On January 24, 1872, the Department of the Interior issued an order canceling all entries theretofore made. On October 31, 1876, Frank W. Folsom, one of the entrymen whose entry had been canceled under the previous order, appealed to the Secretary of the Interior, and Secretary Chandler sustained the validity of his entry, but suspended his decision and directed the local land officials to receive no additional entries until the close of the next regular session of Congress, holding all entries previously made in statu quo.

On June 19, 1878, Secretary Carl Schurz issued an order forbidding the receipt of entries by the local land officers upon this reservation and continuing in force that part of his predecessor's opinion which held the entries theretofore made in statu quo. Secretary Schurz, in an opinion, held all the land entries invalid.

IX.

The returns of the local land office for March, 1879, disclose that notwithstanding the repeated inhibitions against the receipt and filing of additional land entries upon the Mille Lac Indian Reservation, and without any change in the personnel of the incumbents of the district land office, they had allowed additional homestead entries to the extent of 23,913.46 acres. The allowance of these entries was without authority of law and in violation of positive written instructions from the Secretary of the Interior, and all of the same were subsequently canceled by the Department of the Interior.

In May, 1882, Hon. H. M. Teller, then Secretary of the Interior, again reviewed the situation respecting the validity of entries
18 made upon this Indian reservation, and in a written opinion confirmed the Indians' title to said reservation to the extent of land necessary for their habitat and suspended the question as to the validity of land entries until Congress should legislate concerning the rights of the Indians. The effect of this opinion was to reverse the decision of his predecessor in part.

Notwithstanding the opinions of the Secretary and the conflicting decisions emanating from the Land Office, the local land officials permitted the filing of entries upon said reservation, until on March 31, 1884, there had been filings made against 55,976.42 acres of the 61,028.14 acres contained in the said reservation.

On July 4, 1884, Congress passed an act providing "that the lands acquired from the White Oak Point and the Mille Lac Bands of Chippewa Indians on the White Earth Reservation in Minnesota by the treaty proclaimed March 20, 1865, shall not be patented or disposed of in any manner until further legislation by Congress." (23 Stat. L., 98.)

On May 15, 1886 (24 Stat. L., 44), Congress appropriated $15,000 for the purpose of securing, through the Secretary of the Interior, from the tribes and bands of Chippewa Indians in Minnesota, including the Mille Lacs, a modification of existing treaties and certain changes in their reservations. The commissioners appointed by the Secretary of the Interior went upon the Mille Lac Reservation and endeavored under this act to secure the removal of the Mille Lac Indians from the reservation reserved to them by the treaty of 1855. Two futile attempts were made by said commissioners to procure the assent of the Indians to this legislation. The Indians at this time and to these commissioners insisted upon their right of occupancy of the Mille Lac Reservation and refused to assent to the request of the commissioners because it was asserted by said commissioners that they had no title to said reservation, and nothing further was done.

On January 14, 1889, Congress passed an act (25 Stat. L., 642) providing for the classification of lands belonging to the Chippewas of Minnesota into pine lands and agricultural lands and for their sale for the benefit of all Indians in the State of Minnesota, the proceeds arising therefrom to constitute a permanent fund from which annuities would accrue to said Indians for a period of 50 years.

This act further provided for the appointment of commissioners to negotiate with the Chippewa Indians in Minnesota for the cession of their reservations, and in compliance therewith the commissioners so appointed held councils with the Mille Lac Indians on their reservation, occupied by them since the treaty of 1855, represented to them that they came within the terms of the act of 1889, and by virtue of said representation secured their assent and a written relinquishment of their reservation as contemplated by the act, which instrument is as follows:

"We, the undersigned, being male adult Indians over 18 years of age of the Mille Lac Band of Chippewas of the Mississippi, occupying and belonging to the Mille Lac Reservation under and by virtue of a clause in the twelfth article of the treaty of May 7, 1864 (13 Stat., p. 693), do hereby certify and declare that we have heard read, interpreted, and thoroughly explained to our understanding the act of
Congress approved January 14, 1889, entitled 'An act for the
19 relief and civilization of the Chippewa Indians in the State of
Minnesota' (Public, No. 13), which said act is embodied in the foregoing instrument, and after such explanation and understanding have consented and agreed to said act, and have accepted and ratified the same, and do hereby accept and consent to and ratify the said act and each and all of the provisions thereof, and do hereby grant, cede, relinquish, and convey to the United States all our right, title, and interest in and to all and so much of the White Earth Reservation as is not required and reserved under and in accordance with the provisions of said act to make and fill the allotments in quantity and manner as therein provided for the purposes and upon the terms stated in said act; and we do also hereby grant, cede, and relinquish

to the United States for the purposes and upon the terms stated in said act all our right, title, and interest in and to the lands reserved by us and described in the first article (ending with the words 'to the place of beginning') of the treaty with the Chippewas of the Mississippi proclaimed April 18, 1867 (16 Stat., p. 719), and also to the aforesaid Executive addition thereto made and described in an Executive order dated October 19, 1873; and we do also hereby cede and relinquish to the United States all our right, title, and interest in and to all and so much of the Red Lake Reservation as is not required and reserved under and in accordance with the provisions of said act to make and fill the allotments to the Red Lake Indians in quantity and manner as therein provided; and we do also hereby forever relinquish to the United States the right of occupancy on the Mille Lac Reservation, reserved to us by the twelfth article of the treaty of May 7, 1864 (13 Stat., p. 693).

"Witness our hands and seals hereto subscribed and affixed at Mille Lac, in the State of Minnesota, this 5th day of October, 1889.

"HENRY M. RICE,
"JOSEPH R. WHITING,
"*Commissioners.*"

(Then follow the signatures of 189 adult Mille Lac Indians.)

Said agreement was approved by President Harrison on March 4, 1890. (H. R. Doc. 247, 51st Cong., 1st sess., pp. 45–48.)

X.

Subsequent to the passage of the act of January 14, 1889, to wit, on January 9, 1891, the Assistant Attorney General for the Interior Department rendered a decision in the case of Amanda J. Walters. (12 L. D., 59.) In deciding this case the department held that the passage of the act of January 14, 1889, was the further legislation provided for in the act of July 4, 1884, and thereby validated all the entries theretofore suspended and invalidated which had been made upon the Mille Lac Reservation.

On September 3, 1891 (13 L. D., 230), in the case of the Northern Pacific Railway Co. v. Walters, the Interior Department decided that the Mille Lac Indians were guaranteed the use and occupancy of their reservation, which was in force until extinguished by the act of January 14, 1889, and by a decision of the General Land office dated April 22, 1892 (14 L. D., 497), the decision in the Northern Pacific Railway Co. case was applied to cut off entries under the general land laws thereafter.

By a subsequent decision (22 L. D., 388), Secretary Smith in an opinion confirmed the right of occupancy in the Mille Lac Indians under the treaty of 1864, and held that such lands were not public lands in the sense that they might be taken for any other purpose than that specified in the act of 1889. These later decisions were preceded by decisions of various Secretaries found in 5 L. D., 102

and 541, in 8 L. D., 409, and in 10 L. D., 2, all of which concerned the title of the Mille Lacs to their reservation under the treaty of 1864, and are not harmonious.

It appears from the record that in 1882 fraudulent entries of land were made upon the said Mille Lac Reservation, and that as a result of the disobedience of positive orders of the Department of the Interior issued to circumvent the same that one official of the land office at Taylor Falls, Minn., was removed for his participation therein, and that the timber lands at this time entered were subsequently purchased by the Foley Beam Lumber Co., who denuded the lands thus entered of all valuable pine timber. The pine timber has been cut and removed from all the lands embraced in the Mille Lac Reservation, and neither said Mille Lac Indians nor the Chippewa Indians of Minnesota have received any of the proceeds derived from the sale thereof.

On December 19, 1893, Congress passed a joint resolution (28 Stat. L., 576) confirming the decision of the Interior Department rendered in the Walters case, and subsequently, on May 27, 1898, passed a joint resolution (30 Stat. L., 745) declaring the Mille Lac Reservation in the State of Minnesota to be subject to entry by any bona fide qualified settler under the public-land laws of the United States and ratifying and confirming all preemption entries theretofore made prior to the repeal of the preemption law by the act of March 3, 1891, and declaring said reservation to be subject to the same rules and regulations as applied to the public lands of the United States, which resolution deprived said Mille Lac Indians of the benefits of the act of January 14, 1889, as their reservation was not disposed of as by said act provided.

On May 27, 1902 (32 Stat. L., 268), as hereinbefore set forth in Finding VI, Congress appropriated $40,000 to pay said Mille Lac Indians for improvements made upon their reservation occupied by them since the treaty of 1855.

XI.

The Mille Lac Indians never interfered with or molested the persons or property of the whites during their occupancy of their aforesaid reservation.

A report of the Commissioner of Indian Affairs made in 1871, another report made in 1873, another report made in 1874, and another report made in 1878, all stated in positive terms that their conduct had been exemplary.

On May 26, 1880, the Indian Office received a petition numerously signed by the citizens of Morrison County, Minn., a county bordering on the Mille Lac Reservation, commending the Mille Lac Indians in the highest terms for their uniform good conduct, and declaring them to be a peaceable and inoffensive people.

21

XII.

The Mille Lac Indian Reservation, as described in the treaty of 1855, contained 61,028.14 acres of land, as determined by surveys made in 1849, 1865, 1870, and 1902. Of this total acreage, 25,000 acres was agricultural land, leaving 36,028.14 acres of pine land.

The act of January 14, 1889 (25 Stat. L., 642), was amended on June 27, 1902 (32 Stat. L., 401), changing section 5 thereof so as to fix the minimum price at which Norway pine might be sold at $4 a thousand feet on the stump and white pine at $5 a thousand feet.

The court finds that there was 36,028.14 acres of pine land, out of which was reserved for various purposes 1,547.25 acres, leaving 34,480.89 acres of pine land which should be classified as 100,000,000 feet of Norway pine and valued at $4 per thousand feet, and that the remaining portion of said reservation being agricultural lands, as above stated, should be valued at $1.25 per acre, which together amount to $431,250 upon which the claimants herein are entitled to interest at the rate of 5 per cent per annum, from the 19th day of December, 1893, to date of this judgment, making a total of $827,580.72.

Conclusion of law.

Upon the foregoing findings of fact the court decides as a conclusion of law that the Mille Lac Band of Chippewa Indians in the State of Minnesota recover judgment against the United States in the sum of eight hundred and twenty-seven thousand five hundred and eighty dollars and seventy-two cents ($827,580.72), which judgment follows the provisions of section 7 of the act of January 14, 1889.

Opinion.

BOOTH, J., delivered the opinion of the court:

This case now comes before the court on the defendants' motion for a new trial and the claimants' motion to amend findings of fact.

The case came to the court under a special jurisdictional act approved February 15, 1909 (35 Stat. L., 619), as set forth in Finding I.

The claim is predicated upon certain rights alleged to have accrued to the claimant Indians under the provisions of treaties executed in 1855, 1863, and 1864, having to do with the disposition of their landed interests, upon which they have resided since time immemorial. The claimants herein are a band of that formerly large and powerful tribe of Ojibwa (now known as Chippewa) Indians, the largest and most important tribe of the Algonquian stock, who inhabited a most extensive territory about the upper Great Lakes in Michigan, Minnesota, Ontario, Manitoba, and adjacent regions, extending westward to Turtle Mountains in Dakota. On February 22, 1855, the United States, through its proper officials, entered into a treaty with the Mississippi Bands of the Chippewas, by the terms of which they ceded to the Government all their right, title, and interests owned or

claimed by them to lands embraced within the Territory of Minnesota. In consideration for the cession the six bands known as Mississippi Chippewas received a specific reservation set apart out of the lands so ceded upon which they were to permanently reside. The portion set aside to the Mille Lacs, the claimants herein, em-
22 braced four townships bordering on Mille Lac Lake and three small islands in the lake. The United States agreed to pay certain sums in annuities for 20 years, and to expend various other sums in improving the reservations, making them habitable, and otherwise generously providing for the general welfare of the Indians. (10 Stat. L., 1165.)

On March 11, 1863, another treaty was entered into between the same parties at Washington, D. C. The treaty of 1863 (12 Stat. L., 1249) provided for the cession to the United States of the reservations provided for the Indians in the treaty of 1855; provided them with another reservation set apart by particular description; extended the present annuities for 10 years; appropriated $20,000 to pay for depredations committed in 1862; appropriated $16,000 to pay the chiefs of the bands; agreed to pay the expenses of the State of Minnesota incurred in September, 1862, for sending commissioners to visit the Indians, to the extent of $1,338.75; expressly agreed to clear, stump, grub, and plow certain lands on the reservation for each of the bands; to build houses for the chiefs; to furnish oxen, log chains, plows, and other agricultural implements; establish and maintain a sawmill, and otherwise improve and render susceptible to cultivation and habitation their new reservation, to which they were expected to immediately remove.

Article 12 of the treaty—the gravamen of this complaint, upon the construction of which the decision herein rests—provided as follows:

"It shall not be obligatory upon the Indians, parties to this treaty, to remove from their present reservations until the United States shall have first complied with the stipulations of articles 4 and 6 of this treaty, when the United States shall furnish them with all necessary transportation and subsistence to their new homes and subsistence for six months thereafter: Provided, That owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites."

On May 7, 1864, another treaty was entered into between the same parties concerning the same subject. (13 Stat. L., 693.) The annuities were again extended, and certain allotments in fee out of their respective reservations were made to their respective chiefs. Substantially the same provisions for the cultivation and improvement of their new habitat were incorporated therein, although the amounts therefor were increased ($25,000 was appropriated for agency buildings) and article 12 of the treaty of 1863, supra, was repeated verbatim as article 12 of the treaty of 1864.

In April, 1871, filings for homesteads and preemption entries were made under the public-land laws, principally in soldiers' additional scrip, upon the lands of the Mille Lac Indian Reservation. Up to March 31, 1884, 55,976.42 acres of the total acreage of 61,028.14 had been filed upon as open to settlement. On June 20, 1871, the Interior Department ordered the suspension of all entries alleged to have been made under the treaties of 1854 and 1855 and notified the parties that the same would be canceled, and on September 23, 1871, all entries made up to that date were canceled. Subsequently, on March 1, 1877, the Hon. Z. Chandler, then Secretary of the Interior, reversed the preceding decision as to cancellation of
23 above entries, but suspended the execution of his decision and directed the discontinuance of the filing of entries until the close of the next Congress, holding all existing claims in statu quo. In 1878 Hon. Carl Schurz, then Secretary of the Interior, reversed the decision of his predecessor and directed the local land office to discontinue filings upon the lands embraced within claimants' reservation. Notwithstanding the express inhibitions contained in the two decisions of the Secretary of the Interior, the officers of the local land office, who were the same incumbents of the offices of register and receiver when the decisions were announced, continued the receipt of entries until, in March, 1879, they had allowed soldiers' additional homestead entries upon the Mille Lac Indian Reservation to the extent of 23,913.46 acres of land. Secretary Schurz promptly canceled all the entries made in contravention of his express orders, designed as they had been to withhold from public settlement this particular Indian reservation until the rights of the Mille Lac Indians therein could be ascertained.

On May 10, 1882, Hon. Henry M. Teller, Secretary of the Interior, reviewed at length the legal status of the disputed entries upon the Mille Lac Reservation, and decided that a sufficient acreage of the Mille Lac Reservation necessary to maintain and support the diminished band should be set aside for them, and the surplus lands after said ascertainment should be open to settlement as part of the public domain.

In 1884 the Congress passed the act of July 4, 1884 (23 Stat. L., 76, 98), providing that none of the aforesaid lands should be patented or disposed of in any manner until further legislation by Congress. On January 14, 1889, Congress passed an act "For the relief and civilization of the Chippewa Indians in the State of Minnesota." (25 Stat. L., 642.)

Section 1 of this latter act provided for the appointment by the President of three commissioners to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment in writing of all their reservations in said States, except the White Earth and Red Lake Reservations, and so much of said reservations as, in the judgment of the commissioners, was not necessary to fill the allotments required by this act, said cession and relinquishment to be deemed sufficient when

assented to by two-thirds of the male adults over 18 years of age residing and belonging to the several reservations, except as to the Red Lake Reservation, which required the assent of two-thirds of all the Chippewa Indians in the State, provision being made for a census to ascertain the percentage of assent, and upon approval by the President to become conclusive and irrevocable.

Section 2 prescribed for the qualification of the commissioners and fixed their compensation.

Section 3 provided for the removal of all the Indians from their reservations to the White Earth Reservation, except the Red Lake Indians, who were to retain their own reservation. Individual allotments were to be made to the Red Lake Indians on their reservation, and all other Indians so removing were to be allotted lands on the White Earth Reservation, provided, however, that any individual Indian disinclined to remove to the White Earth Reservation might take an allotment on the reservation where he lived at that time.

24 Section 4 provided that subsequent to the cession and relinquishment the Commissioner of the General Land Office should cause the lands to be surveyed the same as other public lands, and after making report thereof to the Secretary of the Interior, examiners appointed by the latter should go upon the lands, subdivide the same in 40-acre tracts, appraise at not less than $3 per thousand feet board measure the pine timber thereon, and classify the same into what should be known as "pine lands" and those without pine timber into "agricultural lands."

Section 5 provided for the sale at public auction, after extensive public notice, of the "pine lands" mentioned in the preceding section. The pine lands were to be offered in lots of 40 acres each and in no event to be sold for less than appraised value. The surplus lands failing to sell at auction should be sold at private sale under same conditions.

Section 6 provided for the disposition of the surplus of agricultural lands over the acreage required by the terms of the act. The agricultural lands were to be thrown open to homestead entries to actual settlers only at $1.25 per acre, and saved by a proviso to said section previous valid and subsisting preemption and homestead entries, to be patented according to the decisions in force at the date of its allowance. It also gave to any person who had not theretofore had the benefit of the preemption on homestead laws and who had failed from any cause to perfect his title the right to avail himself of the provisions of this act.

Section 7 provided that all money accruing from the sale provided for in the previous section, after deducting the expenses incident to the surveys, etc., should be placed in the Treasury to the credit of the Chippewas as a permanent fund, to draw interest at the rate of 5 per centum per annum for 50 years, said interest to be computed annually and disbursed in annual payments to the Indians: One-half of same to be paid to heads of families and guardians of orphan minors; one-fourth of same to be paid to all other classes of Indians;

and the remaining one-fourth to be expended under the direction of the Secretary of the Interior for the establishment and maintenance of public schools. The principal fund was to be distributed per capita at the expiration of the 50-year period among the Chippewas then surviving. The United States further agreed to advance as interest upon said fund the sum of $90,000 per annum and continue said advancement until the principal fund herein provided for, exclusive of deductions, should equal or exceed the sum of $3,000,000, in which event the advancements made herein were to be repaid.

Section 8 simply provided for the necessary expenses of carrying into effect the provisions of this act.

The respective bands of Chippewa Indians accepted the terms of the act of January 14, 1889, and executed in writing their assent thereto. The relinquishment of the claimant Indians will be found in full in Finding IX.

There was another treaty entered into between the same parties on March 19, 1867, the provisions of which simply changed the boundaries of the reservation ceded to the Indians by article 2 of the treaty of May 7, 1864. It does not modify to any considerable extent the previous status of the Indians, and throws no light upon the controversy referred by the special jurisdictional act.

25 On December 19, 1893 (28 Stat. L., 576), and again May 27, 1898 (30 Stat. L., 745), the Congress by joint resolutions validated the entries made upon claimant Indians' reservation and directed the issuance of patents therefor if regular in other respects.

On May 27, 1902 (32 Stat. L., 268), the Congress appropriated $40,000 to pay claimant Indians for improvements upon their reservation upon condition of their removing therefrom and their acceptance in council of the provisions of this act. Provision was made for the reservation to any individual of the tribe of land purchased or leased by him from any person having title thereto from the Government.

The petition herein alleges that the claimant Indians, by virtue of the twelfth article of the treaties of 1863 and 1864, reserved to themselves the right of occupancy of the Mille Lac Reservation as defined in said treaties; that they never by violation of the condition expressed therein forfeited said right until the same was voluntarily transferred to the United States by their assent to the act of January 14, 1889; that the United States failed to carry into execution the provisions of the act of January 14, 1889, and instead of appraising and selling their pine and agricultural lands, did, by the resolutions of December 19, 1893, and May 27, 1898, by validating past entries and approving future ones, open to public settlement under the public-land laws all their reservation, of which they have been deprived. The damages claimed, aggregating three millions of dollars, are rested entirely upon the provisions for the sale of their lands found in sections 5, 6, and 7 of the act of January 14, 1889.

The jurisdictional statute refers a claim; it determines no rights other than the one to litigate; provides a forum with authority to

ascertain, adjudicate, and enforce rights. The question of damages alleged to have been suffered by claimant Indians must be determined by the court upon the same legal principles as appertain to controversies between individuals, and while it defines the nature of the cause of action and recognizes the justice of its determination, it extends no further as respects the merits of the issue. (Stewart v. United States, 206 U. S., 185.)

The jurisdiction of the court is challenged by the defendants. The contention is the plenary authority of Congress over Indian tribes and tribal property. The question of Indian policy is a political one, immune from the action of the courts. (Cherokee Nation v. Hitchcock, 187 U. S., 294; Lone Wolf v. Hitchcock, 187 U. S., 553.) The court recognizes the force of the decisions cited, and if this case came within them would dismiss it immediately. We are not dealing with acts regulating the administration of Indian property and Indian funds in the sense of their validity or invalidity. The question at issue rests upon the construction of treaties and acts of Congress and rights acquired thereunder. The authority of Congress in the premises is not questioned. The jurisdiction conferred extends to an inquiry as to what if any damages the claimants suffered by reason of an alleged taking of their property acquired under treaties which failed of execution because of acts of Congress. It is a warrant of authority to adjudicate results and not determine the means employed to bring about the same. In Cherokee Nation v. Hitchcock, supra, the court said: "There is no question involved in this case as to
26 the taking of property; the authority which it is proposed to exercise, by virtue of the act of 1898, has relation merely to the control and development of the tribal property, which still remains subject to the administrative control of the Government, even though the members of the tribe have been invested with the status of citizenship under recent legislation." Lone Wolf v. Hitchcock followed the Cherokee case, supra, and the court therein was dealing with administrative measures designed to control Indian property, "a mere change in the form of investment of Indian tribal property."

This court has in the past considered numerous cases similar to this, one quite recently decided, The Ute Indians v. United States (45 C. Cls., 440), wherein a judgment for over $3,000,000 was awarded the claimants, and no appeal therefrom taken by the United States. The additional point as to the right of the claimants to sue as an individual band necessarily follows the development of the case and is determined thereby.

The proviso to article 12 of the treaties of 1863 and 1864, "That owing to the heretofore good conduct of the Mille Lac Indians they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites," is claimed as the basis of claimant Indians' title to the Mille Lac Reservation. These two treaties, substantially identical in so far as this case is concerned, were negotiated in consonance with the general governmental purpose to acquire the Indian do-

main and at the same time provide equitably for the Indians until advancing civilization should absolve the Government from their care and maintenance. The Indians at this time were parting with their reservations, a transaction quite solemn on their part. Their savage reverence and almost holy attachment to their native habitats, the place of the burial of their dead, the country of their fathers, caused them more than once to cling to their reservations with a persistence that yielded only to the force of arms or the decrees of nature. They were always reluctant to move. The Mille Lacs, parties to the treaties, were jointly and commonly interested in the reservations of the Mississippi Chippewas, being ceded by the treaties, their assent to the treaties was, or at least was supposed to be, indispensable to its effective execution, and the language of the proviso to article 12, repeated in both instruments, was intended for some purpose, and it manifestly conferred some rights. Was it a reservation of their lands, the right to occupy the same under the express conditions of the reservation, or was it a mere license or favor, a temporary cession, a right of sufferance, as suggested by the defendants?

The title to Indian lands vested in Indian tribes was the right of occupancy, the ultimate fee in the lands was in the United States, and the right of conveyance by the Indians was limited to the United States or to some one else by their express consent. This rule, following the case of Johnson v. McIntosh (8 Wheat., 543), has obtained without interruption through the whole course of judicial procedure from that early time until the present day. (Jones v. Meehan, 175 U. S., 1; United States v. Winans, 198 U. S., 371.)

In construing Indian treaties ambiguities and doubtful clauses should be construed in favor of the Indians. This rule is ancient and elementary. It is predicated upon the disparity in intelligence between the contracting parties, the lack of a comprehensive written language for the Indian, and the innumerable and manifest
27 opportunities to misinterpret the meaning of treaty stipulations. The intention and understanding of the Indian tribe of the rights secured to them by conventions of this character is of paramount importance, and councils at which they were ratified and confirmed are admissible in evidence to this end. They are not to be construed according to the technical meaning of the words employed, but in that generous and comprehensive manner which justice exacts in dealings between a strong and intelligent party on the one side and an illiterate and inferior party on the other. (Worcester v. Georgia, 6 Pet., 515; Choctaw Nation v. United States, 119 U. S., 1; Jones v. Meehan, supra, United States v. Winans, supra.)

A proviso to a statute (likewise a treaty) is purposed to qualify or except from the general operation and effect of the enacting part persons and property, or the conditions upon which persons and property will not be effected by the result sought to be accomplished. Likewise, it is imperative in ascertaining the intention of the parties to a contract ambiguous in terms, that all the surrounding circumstances

and conditions under which the transaction was consummated shall be taken into consideration.

It will be observed that the treaty of 1863 was executed on March 11 of that year. The date is important, for at the time the United States was engaged in war. In August, 1862, Hole-in-the-Day, a famous Chippewa chief, became hostile to the United States and attempted an uprising among the Indians, with intent to join forces with the then hostile Sioux, whose terrible atrocities and fearful massacre of innocent men, women, and children terrorized the whole State of Minnesota. It was a disturbance much to be deplored at this particular juncture in the Nation's history and fraught, as it was, with imminent danger to the poorly protected white people, whose soldiers previously stationed among them had been largely drawn into the service of the Government. Shaw-vosh-kung (a name as variable in spelling as pronunciation), the chief of the Mille Lac Band of the Chippewas, headed an expedition to extend relief, if necessary, to Fort Ripley, then in possession of Commissioner Dole, of the Indian Office, and 35 United States soldiers, declined to aid the hostility of Hole-in-the-Day, and by thus withdrawing his support and that of his band, in the neighborhood of 800 strong, and enlisting in the cause of the Government, frustrated the proposed massacre of the whites and forced the peace of the Indians. In a short time thereafter Commissioner Dole gathered together the chiefs and head men of the Chippewa bands and, accompanying them to Washington, assisted in and accomplished the execution of the treaty of March 11, 1863. It is conceded and incontrovertible that the consideration for the proviso in article 12 of both treaties was the services rendered the Nation by the Mille Lac Band of Chippewas in declining to join and in assisting to prevent an Indian uprising in the midst of a civil war. This is the good conduct referred to in the proviso, and to this treaty the name of William P. Dole is attached. The language of the proviso would be difficult to construe in any other way than the granting of a right of occupancy to the Mille Lac Band. That they shall not be compelled to remove was certainly equivalent to a right to remain. Remain where? Why, on the Mille Lac Reservation, for all other reservations had been by the treaty ceded to the Government. Were the Mille Lacs engaged in the meaningless
28 ceremony of ceding away all their right to the lands to which they were attached with a fondness heretofore described? Was the discrimination in their favor the reward for their signal services of loyalty, a granting of a mere license to live on their reservation, bury their dead there, build their improvements, and then to be dispossessed at the pleasure of the advancing whites? The governmental policy at the time, as since, was to encourage the Indians to take permanent places of abode, improve their reservations, cultivate the soil, and otherwise acquire the habits and industry of the whites. Every article of the treaty abounds in generous promises of material assistance to this end. Their tenure, it is true, was conditioned upon good behavior toward their white neighbors; but can it be said that

this alone converted the ordinary title of right of occupancy into an anomalous Indian title, one of license and favor? Defendants urge that the condition anticipated settlement of the lands by the whites and the interference inhibited was to approaching settlers. Is it not more reasonable to suppose it referred to the neighboring whites, those adjoining the reservations? It could not possibly have meant any whites on the reservation at the time, for the law expressly prohibited their presence on an Indian reservation. Article 3 of the treaty set aside $20,000 to pay for depredations committed by the Chippewas in 1862. Is it not just as reasonable to suppose that the provision intended a restraint upon further conduct of this character?

Commissioner of Indian Affairs Price in an exhaustive letter upon this subject, written in April, 1882, in analyzing this feature of the claimants' title, said:

"Manifestly, I think, reference was intended to the white settlers occupying the surrounding country, their neighbors especially, for there could have been no whites lawfully living upon the reservation at that time, and it was hardly intended in anticipation of the entry and settlement of whites upon the reservation and with a view to their protection; for the Indians being in occupation, the introduction of whites into their midst would unquestionably result in conflict at once; indeed, it is not difficult to see that such common occupancy by Indians and whites would be quite impossible. The Indians were there, and until they were removed, either by their own consent or by reason of the forfeiture of their right of occupancy, the whites manifestly must keep out. * * * For the sake of argument, let us suppose that the language of the proviso was intended to apply to settlers coming upon the reservation. Then the Indians, if they would not work a forfeiture of their right of occupancy, must not interfere with or molest either the persons or property of such. Surely nothing more. It does not provide that they shall make way for or vacate or abandon any improvements or shelter they have or land to these people. It is only required that they shall not interfere with or molest either their persons or property. These words ('interfere' and 'molest') when employed in such connection in respect of the conduct or action of Indians are, I think, to be interpreted in their worst sense. And when it is remembered that only a few months before the treaty was made the whole country there had been thrown into a state of the greatest alarm on account of the uprising of the Indians of that section, it is clear to my mind that the framers of the treaty intended that they should be interpreted in no other way."

29 The qualifications to the reservation were in most respects surplusage. If the Indians had persisted in bad conduct toward the whites, if they assumed a hostile attitude toward the people and the Government, the military arm of the United States would have promptly interposed. In addition to all this the Government made no effort by treaty or legislation to dispossess said Indians or in any manner disturb their occupancy of this reservation until

1886, notwithstanding the violent and most persistent controversies, sometimes favorable, sometimes unfavorable, going on between the Land Office and anxious entrymen.

In some Indian treaties the right to hunt over and fish in the waters adjoining the ceded reservations is excepted from the treaty, and in some instances express words have reserved rights to the ceding Indians. The language used to establish said reservations has most generally been positive and unambiguous, leaving no doubt as to the intention of the contracting parties. If a mere license to pursue game was intended, apt language expressed the same; if possessory rights were conferred, doubts as to the extent of title were removed by the context of the article creating the same. (Kappler's Treaties, vol. 2, pp. 19–22.)

No mere license to fish and hunt was conferred upon the Mille Lac Indians by article 12 of the treaty of 1864; if so, the language used would have clearly expressed the same. The distance between White Earth and Mille Lac negatives this intention. What other Indian right then could have been intended save the right of occupancy?

The word "remove" as used in the treaty has especial reference to a change of residence, for that was the subject matter of the negotiations. The Mille Lac Indians resided on their reservation and had been there since 1855. If they intended to cede their lands and at the same time reserve to themselves a right of residence thereon, a possessory right as strong as they could possibly acquire, then the treaty could have no application to their particular lands, and served as a conveyance of their cotenancy rights in the common reservations of the tribe. It confirmed rather than extinguished their rights under the treaty of 1855. The language of article 12 is not ambiguous and if considered apart from the context of the whole instrument could convey but one meaning. And when considered in connection with the context of the treaty, the purposes to be accomplished, and the circumstances attendant thereon, its meaning is in accord with similar provisions in previous Indian treaties. Why, this very article in the treaty of 1864 by a subsequent provision reserves to the Sandy Lake Indians a coextensive right with the Mille Lacs. The provisos were unquestionably inserted as favorable clauses to secure the free assent of the Indians to the treaties; they were the result of negotiations and the final contract of the parties. They are not unusual or anomalous. There is nothing mysterious about them, for many Indian treaties provide extensive exceptions. The very term "treaty" contemplates a series of mutual concessions and reservations to define explicitly the rights of the contracting parties, and Indian treaties were no exception to the rule.

The White Earth Reservation carved out by the treaties and embracing a vast acreage of land was 150 miles distant from the Mille Lac Reservation. It was to this reservation the Chippewas were to be removed by the articles of the treaties, and extensive
30 appropriations were made to improve it and to provide for schools and other civilizing influences. Many comforts, ad-

vantages, and conveniences were open to the Mille Lacs if they would remove. The inducements were all extended to accomplish the removal of the Indians to secure a cession of their lands that they might be thrown open to public settlement. Under all these circumstances it seems improbable that astute and experienced Indian officers charged with the special duty of securing this treaty would overtly and inte'tionally leave upon an Indian reservation a large band of loyal Indians 150 miles away from the reservation provided for the other bands with no greater security of title, no greater right than one subject to the cupidity, as it afterwards proved to be, of covetous lumbermen.

Numerous Indian cases have been before this court involving millions of acres of land and millions of dollars in money, but in no one of them, after a most careful examination, can the court find a contention similar to this, wherein Indian title is made to rest upon sufference, as distinct from their right of occupancy, the greatest title they could possess. It is said by the defendants that the provision in article 4 for the improvement of 70 acres for the Mille Lac Band on the White Earth Reservation evidences an intention to effect their removal thereto. The answer to the contention is twofold. First, why didn't they do it? The opportunity was at hand, and the Indians were at peace and assented to the treaty. Second, the language of the proviso gave the Mille Lacs an option, a right of election to remain or go. "They shall not be compelled" is the language of the proviso. They elected to remain, and during the subsequent years of their occupancy fulfilled the conditions of their tenure, a fact fully attested by every Indian agent and every other witness in the record. It is conceded by the defendants that the claimant Indians did not molest or interfere with the persons or property of the whites. It is true that evil practices contaminated to some extent the personal conduct of individual Indians. The introduction of whisky was the prime cause. White Earth was not free from the same evil and the surroundings there as respects the opportunity to procure and indulge intemperately in this commodity were about the same as at Mille Lac.

The Mille Lac Indians understood at the time of the execution of the treaty that they were securing and reserving to themselves the Mille Lac Reservation. The treaty, as before observed, was negotiated in Washington, and no record of the proceedings incident thereto is available. Senator Henry M. Rice, a gentleman of large Indian experience, a devoted and trusted friend of the Indians, was one of the commissioners appointed to assist in the procurement of the treaty, and his name is affixed to the treaty of 1863. In 1889 Senator Rice was again selected to secure the assent of the Indians to the act of January 14, 1889. On October 2, 1889, on the Mille Lac Reservation, addressing a council of the Mille Lac Indians assembled for this purpose, he used this language: "I wish to refer to an old matter that has given you a great deal of trouble. That is the treaty made at Washington some 25 years ago. I was there, and know all

about it. It was a wise treaty, and if it had been properly carried out you would have escaped all the trouble that has befallen you. Men who cared more for themselves than they did for you thought they had found a hole in it, and they would take advantage of
31 that and deprive you of your rights. They knew that the Government was engaged in a great war which occupied all its time. They thought that under the circumstances they would be able to drive you from this reservation. * * * The time has come when I am able to tell you that all he said, all I have said to you, all the chiefs told you who were there and made the treaty, is correct. Here is the acknowledgment of the Government that you were right, that 'you have not forfeited your right to occupy the reservation.'"

On May 15, 1886 (24 Stat. L., 44), the Congress appropriated $15,000 to enable the Secretary of the Interior to negotiate with the several tribes and bands of Chippewas in Minnesota for modification of existing treaties and such changes in their reservations as might be deemed desirable and best by the Indians and the Secretary. In pursuance of the above act the Secretary appointed Hon. John V. Wright, a jurist, Bishop H. B. Whipple, and Hon. Charles F. Larrabee to carry forward the negotiations. On October 9, 1886, on the Mille Lac Reservation, Mr. Larrabee, in addressing the Indians in council assembled in the course of an attempt to secure their removal from Mille Lac to White Earth Reservation, used these words: "Long ago you ceded your reservation to the United States, with the understanding, however, that you were not to be compelled to remove so long as you did not molest or interfere with the persons or property of the whites. That is all the rights you have in this land—a very feeble tenure." On the following day the Mille Lac Indians expressed great surprise at the statement of Mr. Larrabee, and in more than one public address disclaimed his construction of the treaty, contended for their right of occupancy, and finally grew so indignant over the matter that they withdrew from the council and terminated the negotiations. A subsequent council called for the same purpose, conducted by the same parties, again proved abortive because of a similar statement conveyed to the Indians by the commissioners and supplemented by a written opinion of the Secretary of the Interior. In 1889 and again in 1902 the Indians persisted in their right of occupancy and approved agreements with the distinct understanding that all claims under the former treaties should be preserved. Their complete understanding of the treaty is manifested not only by their words spoken in council meetings, but by the dogged persistence with which they retained their residence on the Mille Lac Reservation under most discouraging circumstances until subsequent to the cession of 1889.

In the case of California and Oregon Land Co. v. Worden (85 Fed. R., 94), the Congress in 1864 granted to the State of Oregon alternate sections of public land for three sections in width, to aid in the construction of a military road. Subsequently it appeared that the land so granted was embraced within Indian country. A treaty

negotiated with the Indian owners of the land in the same year secured a cession to the United States of the Indian lands, with a proviso, however, that a particular tract embraced within the general cession should be set apart as a reservation for the Indians until otherwise directed by the President. All the lands to the extent of 130,000 acres taken under the congressional grant were located within the lands set apart by the proviso. Plaintiff's contention was planted upon the general cession of all the Indian lands embodied in the first articles of the treaty, insisting that the proviso was a
32 reservation subsequent to the vesting of their title and invalid. The court held that the Indians had not by the terms of the treaty ceded title to their reservation; that it was not a cession and recession of reserved lands, but a mere reservation to the Indians of the same right and title they originally had. This case is exceedingly apropos.

In United States v. Winans (198 U. S., 371) the Supreme Court construed a treaty with the Yakima Indians made in 1859. The Indians by the treaty ceded to the United States their vast estate except a certain reservation. Article III of the treaty provided for an exclusive right of taking fish in all streams running through or bordering on their reservation and a similar right at all usual and accustomed places in common with the citizens of the Territory. Subsequently the ceded lands were patented and the Indians were excluded by the owners in fee from the fishing privileges guaranteed by the treaty. Respondents contended that the Indians' rights under the treaty were no greater than the white man's under conditions of absolute ownership; that the fee being in him he had a right to exclude the Indians from his premises. The court said in overruling this contention: "In other words, it was decided that the Indians acquired no rights but what the inhabitants of the Territory or State would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more. * * * In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." (Spaulding v. Chandler, 160 U. S., 394.) If the privileges granted by Article III of the above treaty were superior in extent and duration to a mere license, it is quite difficult to reconcile the taking of a home—a supposed place of permanent abode—with the idea of such feeble and uncertain tenure as an estate by sufferance. (United States v. Thomas, 151 U. S., 577.)

The act of January 14, 1889, following as it did years of discussion as to the rights of the Mille Lac Indians to their reservation, would seem to confirm their title in every respect were it not for the second proviso to section 6 thereof. This proviso, validating certain homestead and preemption entries made on Chippewa lands, and extending additional privileges as to entries not theretofore perfected, brings forth a defense that this act does not apply to the Mille Lac

Reservation. In other words, the restrictive provisions applying to the sale of the Indian lands extends only to the diminished White Earth, Red Lake, and other reservations not embraced in the cessions of 1863 and 1864. Defendants' contention is rested upon the various and conflicting decisions of the Interior Department emanating from controversies in the General Land Office. The Mille Lac Reservation, like all the other Chippewa reservations in Minnesota, was rich in pine timber. Squatters had sought to acquire rights in this particular reservation prior to 1871, and the complaints about the same were numerous and persistent. The timber lands were valuable in 1864 and enhancing in value as time progressed. As soon as the treaty of 1864 was proclaimed this controversy arose. If the reports of regular and special Indian agents are to be credited, it was conceived in fraud and developed by deceit and circumvention. The findings show that as early as November 13, 1871, the special
33 agent in charge of Indian affairs in this locality, in conjunction with a special representative of the Indian Office, after a detailed and special examination of all the entries for land up to that date, denounced practically every one of them of every class and description as fraudulent and corrupt. The entries were not made in good faith, but with a notorious attempt to preempt the pine lands to the exclusion of agricultural lands. We have examined with great care the opinions of Secretaries of the Interior Chandler and Teller, alleged to be adverse to claimants' contention. In each of these opinions the rights of the Mille Lac Indians, acquired under the treaties of 1863 and 1864, are fully respected. Secretary Chandler suspended his decision to await legislation in behalf of claimants, and Secretary Teller confirmed claimant Indians' right of occupancy to so much of the Mille Lac Reservation actually necessary for their habitat. An opinion of Secretary Lamar, conveyed to the Mille Lacs in council in 1886, is quoted as adverse to claimants' contention. The opinion is set forth in the findings. Its brevity alone arouses the suspicion that the Secretary had probably subscribed to a document prepared by some subordinate in the Land Office. It seems most improbable that a jurist of such great eminence would dismiss a subject of such magnitude and prolonged discussion with so few words. The opinion supplementing another at the same time would seem to have been prepared in haste and for the avowed purpose of securing the assent of the Indians to the act of 1886, and which we submit does not in any way negative the conclusions reached herein. Up to January 14, 1889, four Secretaries of the Interior and at least two Commissioners of the General Land Office had delivered conflicting opinions in respect to the claimants' title to this reservation. The greater proportion of the land entries received and entered by the officials of the local land office were so made in direct violation of express orders from the Interior Department prohibiting the same, and infraction and disobedience which finally became so acute as to result in the dismissal from the service of one of the offending officials.

The defendants in this case ask for a specific finding of a conspiracy between eminent public officials and the local land officials at Taylors Falls, Minn., to enter over 23,000 acres of this reservation, which was at the time thwarted by the vigilance of the Interior Department. In 1884 Congress halted the whole proceedings, and with the exceptions noted in the findings patents were suspended and entries prohibited. In 1886 Congress attempted the removal of the claimants to make way for settlers, and failed. Therefore, in 1889 Congress had before it a controversy with respect to Indian pine lands extending over a period of 18 years. The legislation then enacted superseded the general land laws, conserved the valuable resources of the Indians, and threw around the disposal of their pine such positive restrictions as to prevent its fraudulent acquirement. Why this great necessity to erect barriers against fraud and corruption save the prevalence of this stealthy practice as against these claimants? Are we to presume that the salutary legislation of 1884 was repealed by a proviso in an enactment made for the general purpose of forestalling the very thing the act of 1884 did prohibit? Repeals by implication are not favored in law. The debates in Congress incident to the passage of the act of January 14, 1889, indicate a legislative intention to prohibit by the terms of the act the
34 unwholesome and corrupt practices previously obtaining as to the acquirement of Chippewa timber lands. If this proviso was intended to ratify repeated transactions, for the most part fraudulent in character previously committed, and leave the statute operative only as to future transactions, it was a most singular division of justice between unoffending parties. The language of the proviso negatives such contention. Only "subsisting, valid, preemption, or homestead entries" were to be proceeded with and in accordance with the decisions in force at the date of its allowance. Can it be contended that this language embraced that large and most numerous class of claims entered in positive violation of express instructions? Can it be said that a single case now in issue respecting pine lands, in view of the numerous and conflicting decisions of the Secretaries, was stare decisis at the time of its allowance? At the time of the passage of the act of January 14, 1889, comparatively few patents had been issued as against claimants' lands and absolutely no continuity of decision or construction of law had obtained in reference to right of entrymen. On the contrary, it was unsettled and uncertain. The language of the proviso only authorized future proceedings in accordance with settled law. In fact, the second and third provisos to section 6 of the statute do not relate at all to pine lands. They are applicable only to agricultural lands and were eminently fair and just. The entire section is devoted to the disposal of agricultural lands and the provisos save to bona fide settlers their rights under the laws in force at the time of their filing. The second proviso, confirming this position, absolutely protects the Indian rights in these same lands and in no wise injuriously affects the generous provisions as to disposition of funds arising from their settlement. The stringent provisions found in the first proviso to section 6 are in-

tended to prevent a recurrence of the particular frauds practiced to secure patents which had so generally obtained as to the pine lands. No provision whatever is made for a public settlement upon pine lands; they were to be disposed of by public and private sales. The act in question was securing to the United States a cession of at least 3,000,000 acres of Indian land, the classification of the same being preliminary to its disposition in favor of the Indians. Congress recognized the paramount value of the timber tracts and the danger of their acquirement by lumber corporations for a nominal consideration. The agricultural lands, not so valuable, and hence not so inviting, were to be opened under the provisions of the law to bona fide homesteaders, and the rights of the comparatively few in number who had, in good faith, intending to secure a home, filed thereon were to be respected.

It is hard to believe that the Government of the United States would by express treaty stipulations grant a right to peaceable, loyal, and well-behaved Indians, a right doubly sacred to them, and then, in not to exceed seven years from the date of said grant, countenance their ejectment from the lands so granted by a series of fraudulent entries under the general land laws. If the Government intended the Mille Lac Indian Reservation to be open to entry and settlement under the general land laws, it would have so announced, removing all doubt, and doing as is usually done under similar circumstances.

The Department of the Interior, the commissioners appointed by the President to procure the assent of the Indians to the act of
35 January 14, 1899, all treated the Mille Lac Indians as coming within the purview of its provisions. A council extending over several days was held on the Mille Lac Reservation to secure their approval thereto; they were positively and repeatedly assured by the representatives of the Government that they were within its terms; and their written relinquishment of their title to the same, executed by a majority of the tribe residing on the reservation, was secured upon the faith of said representations. Absolutely no doubt existed then as to the scope of the law or its applicability to claimant Indians. The fact of allowance of homestead entries to the chief of the band and his son argues little. We need not cite authorities to sustain the proposition that the Interior Department is entirely without authority to issue valid patents to Indian lands. (United States v. Carpenter, 111 U. S., 347.) If these patents are at all valid they must rest upon treaty rights or statutory law.

The Mille Lac Indians were the only band mentioned in the treaties of 1863 and 1864 subsequently asked to relinquish their reservation under the act of January 14, 1889. Surely their status was something different from that of their ancient allies.

The Congress as late as July 22, 1890, treated the Mille Lac Reservation as Indian lands, for on that date an act was approved granting a railway company a right of way and other privileges through and upon the reservation, expressly reserving to the Mille Lacs in their tribal capacity the damages incident thereto. (26 Stat. L., 290.)

The technical language used in the written instrument subsequent to claimants' assent to the act of January 14, 1889, is cited as indicating a difference in title as to claimant Indians. The use of the word "relinquish" when speaking of the Mille Lac Reservation as distinguished from the word "cede" when referring to the White Earth and Red Lake Reservations can hardly be relied upon in the determination of Indian title. The words are frequently used in Indian treaties conjunctively, and in so far as they affect the conveyance of Indian title the employment of either word would effectively divest the Indians of their right of occupancy. It is quite true that to the trained lawyer they have a distinct technical significance, but are so nearly synonymous that even they employ them carelessly. In construing Indian treaties their technical significance vanishes.

In Worcester v. United States (6 Pet., 236) Chief Justice Marshall, in language so directly applicable to this case that we cite it in full, said: "It is reasonable to suppose that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish the word 'allotted' from the words 'marked out.' The actual subject of contract was the dividing line between the two nations, and their attention may very well be supposed to have been confined to that subject. When in fact they were ceding lands to the United States and describing the extent of their cession, it may very well be supposed that they might not understand the term employed as indicating that instead of granting they were receiving lands. If the term would admit of no other signification, which is not conceded, its being misunderstood is so apparent, results so necessarily from the whole transaction that it must, we think, be taken in the sense in which it was most obviously used." The rule established by this case has been followed by the Supreme Court in construing
36 Indian treaties ever since. (Jones v. Meehan; United States v. Hitchcock; United States v. Winans; Cherokee Intermarriage Cases, 203 U. S., 76; all heretofore cited, and many other cases too numerous to mention.) It is well-settled law.

The Mille Lac Indians in this instrument expressly recited that they were dealing with the Mille Lac Reservation occupied and belonging to them "by virtue of a clause in the twelfth article of the treaty of May 7, 1864 (13 Stat., p. 693)."

Lastly, granting, arguendo, but not conceding the force of the defense, then in that event the provisos to the act of January 14, 1889, were the initiatory legislation subsequently confirmed by the resolutions of December 19, 1893, and May 27, 1898, which deprived claimant Indians of their right of occupancy in the Mille Lac Reservation. The jurisdictional act provides for the assessment of damages "by reason of the opening of the Mille Lac Reservation * * * to public settlement under the general land laws of the United States." If this legislation served the purposes contended for by defendants, it likewise opened to public settlement claimants' res-

ervation by confirming all the entries made thereon previous to its enactment, and the various amounts provided for the Indians can well serve as a basis for damages in this cause.

On January 9, 1891, the Interior Department decided the case of Amanda J. Walters (12 L. D., 59). The claimant in the case had previously been allowed to make entries on the Mille Lac Reservation, and the issue was her right to a patent therefor. The Secretary confirmed her right of patent, resting his decision upon the second and third provisos to section 6 of the act of January 14, 1889, asserting therein that said provisos constituted the further legislation provided for in the act of 1884 annulling all the aforesaid entries. The decision mentioned is another of the numerous conflicting views indulged by the Land Office officials in connection with this long controversy. (5 L. D., 102, 541; 8 Ib., 409; 10 Ib., 2; 13 Ib., 230; 14 Ib., 497; 22 Ib., 388.) The decision in the Walters case was followed in September, 1891, by the case of N. P. R. R. Co. v. Walters (13 L. D., 230), sustaining the claim of the claimant Indians to their right of occupancy of their reservation, holding the same was in force until ceded by the act of January 14, 1889, and on April 22, in an opinion by Secretary of the Interior Noble (14 L. D., 497), the rulings in the previous opinion were applied to prevent entries under the general land laws.

The resolution of December 19, 1893 (28 Stat. L., 576), by its terms was simply intended by the Congress to protect bona fide homestead filings or entries upon the Mille Lac Reservation which had been made subsequent to the rulings in the Walters case, and by virtue thereof, and before the contrary holding in the N. P. R. R. Co. case, made on April 22, 1892, and under the opinion of April 22, 1892, the remaining agricultural lands of the Mille Lac Reservation were opened to homestead entry under the terms and provisions of the act of January 14, 1889.

The resolution of May 27, 1898 (30 Stat. L., 745), enacted as it was to put an end to the land-office controversy by which the whites were first let in and then put out, unquestionably ratified all previous entries and interposed to deny the claimants the benefits of the act of January 14, 1889. It divested them of their reservation
37 and under its provisions the lands upon which they so long resided have been almost, if not entirely, taken up by white settlers and lumber companies.

The act of May 27, 1902 (32 Stat. L., 268), appropriated $40,000 to pay the Mille Lacs for the improvements made upon their reservation. It can not affect this controversy, and was at the most a tardy and almost inconsequential recompense to secure their removal from a reservation from which they had already been excluded by being divested of their Indian title, and upon which they had remained because of the failure to extend to them the benefits of the act of 1889. All the treaties with the Mille Lacs provided payment of expense of removal to their new reservation. The Congress by the terms of this act recognized their possession of the reservation as a tribe by author-

izing the amount appropriated to be paid in accordance with tribal law adopted in council proceedings. The Indians in assenting to the above act reserved in writing all rights to which they were entitled under existing treaties or agreements, and notwithstanding the statements of the commissioners to the Indians that they had no title to the lands (a statement repeatedly contradicted by the Indians), they were assured by them that their assent to the act of 1902 did not in any wise affect their assertion to prior claims arising under previous agreements and treaties. It must not be overlooked that under the act of January 14, 1889, the Mille Lacs were entitled to allotments on their reservation in common with the other Indians.

It has been most forcibly brought to the attention of the court that a judgment in this case results in a double payment to the Mille Lac Indians. In some respects this is true. It can hardly be said to be a double payment, but is more in the nature of an additional allowance or a supplemental benefit, which in any case accrues alike to all the Mississippi Chippewas mentioned in the treaty of 1864. The Mille Lacs have participated in the annuities allowed by the treaties of 1863 and 1864, and the few of the minority of the tribe who removed to the White Earth Reservation received the benefits of treaties, but the great majority of the tribe—the real Mille Lac Band, who remained on the Mille Lac Reservation—received no benefit from the provisions of the treaties providing for schools, blacksmith shops, agricultural implements, etc., on the White Earth Reservation until their removal thereto. In fact, the Mille Lac Indians remained on their reservation, claiming title thereto under the treaty of 1863, without the numerous advantages and profitable perquisites granted to the other bands of Mississippi Chippewas who did at the time remove to the White Earth Reservation. They withstood at times the most intense poverty, and while they were of good reputation among the neighboring whites, under most adverse circumstances, they willingly forbore many of the advantages of White Earth to occupy their ancient home. Under the act of January 14, 1889, they are, and under all other treaties and agreements were, entitled as fully as any other Chippewa Indian Band to the full and complete advantages and emoluments derived from the disposition of Chippewa lands held in common by the tribe. The exception granted to them was a reward for their patriotic conduct in 1862. It rests upon no other consideration, and would fall far short of accomplishing the purpose if they were held to have released
38 all their rights in the vast area of lands set apart for the Mississippi Chippewas and received in return simply their own reservation without the means of livelihood or improving the same. As was well said in the argument of the case, it was too great a bonus to pay. If payment is now denied them the reward was an empty promise, the sacrifice of years, a needless hardship.

In any event the argument is devoid of merit. The question is not one which goes to the considerations for the treaties or benefits to be derived therefrom. That is for the political department of the Gov-

ernment. The courts are confined alone to an interpretation of what rights did accrue, and not as to their justice or injustice. The Congress is vested with complete authority to determine questions of this character, and its jurisdiction is exclusive.

In United States v. Choctaw, etc., Nations (179 U. S., 541) Mr. Justice Harlan, speaking for the court, said:

"Now, it is argued that if the interpretation placed by the United States upon the treaty of 1866 with the Choctaws and Chickasaws is accepted the result will be that the General Government has been more liberal toward the Seminoles and Creeks than it has been with the Choctaws and Chickasaws. But that can not constitute a reason why the court should depart from the ordinary signification of the words used in the treaty with the Choctaws and Chickasaws. If Congress chose to adopt one course toward the Seminoles and Creeks and a different course toward the Choctaws and Chickasaws, it is not for the judiciary to defeat the will of the legislative branch of the Government by giving to an Indian treaty a meaning not justified by its words."

In any event, it is quite doubtful if any advantages will accrue to the Mille Lac Indians in view of the judgment that will hereafter be rendered in this case. Whatever inequality may appear is minimized by the terms and provisions of the act of January 14, 1889. This statute marshals the proceeds from the sale of all the Indian lands therein mentioned and extends to all the Chippewa Indians in Minnesota the right to participate therein. Thus it will be seen that the amount accruing to the Mille Lacs by reason of the opening up of their reservation to public settlement will become a part of the general fund provided for in the act of 1889.

The treaties of 1863 and 1864 reserved to the claimants the Mille Lac Reservation. They remained as a band in open, notorious possession of the same, a lawful notice to the world of a claim of title, until the resolutions of the Congress opened their domain to public settlement and divested them of title to their lands. They fulfilled all the conditions of the tenure, remained at peace with the whites, and were fully entitled to the benefits of the act of January 14, 1889, which were denied them. (United States v. Thomas, 151 U. S., 577.)

It is seriously contended that the court in the Fond Du Lac case (34 C. Cls., 426) decided the issue here involved, and denied relief under similar circumstances. The case mentioned was determined under a limited, specific, and mandatory jurisdictional act. While the proceedings were similar to a suit at law, the relief to be afforded was distinctly equitable. Any judgment found due predicated upon treaty rights was to depend for its finality upon two equitable considerations expressly named in the jurisdictional act, viz, whether
39 subsequent to the treaty there had been any equitable adjustment made to the Indians because of failure to execute the treaty stipulations; and what, if any, advantages accrued to the Indians under the act of January 14, 1889. The court found and so reported that the injury resulting from failure to execute the treaty

was fully recompensed by the subsequent proceedings, composed the differences, and dismissed the petition. Of course the Fond Du Lacs receives distinct advantage by reason of the right to participate in the common fund provided for in the act of January 14, 1889, and Congress expressly, or, as said in the opinion, "commands us by the imperative shall" balance this advantage against the prior injury and determine results accordingly. The court found the exact number of acres included in the treaty reservation, and had the jurisdictional act in that case been similar to the one in this case, viz, to adjudicate rights under express treaty stipulations without qualification, doubtless the result would have been different. Charged, however, as we were in the Fond Du Lac case, to treat both the legal and equitable phase of the situation, evidently in the first instance occasioned by mistake in excluding the improved portions of the Indian lands, Congress extended the privileges of a forum and the right to prosecute and adjudicate to a simple determination of what was just under existing conditions. The Indians had accepted the changed reservation, occupied it without protest or manifestation of displeasure, their interests had been enhanced thereby, they got what they originally wanted and manifestly intended to get, they knew no different until years afterwards, and while within the strict letter of the law as applied to lands other than Indian lands the excluded portion might have been included, and the included portion excluded, the Congress in the exercise of its plenary power over Indian lands and Indian tribal affairs was not willing to submit that question to this court for determination. The act of jurisdiction was sui generis; it is in nowise similar to the one in this case. If the situation of the Fond Du Lac and the Mille Lac Indians as respects benefits under the act of January 14, 1889, were in any respect similar, the court might lend some weight to defendants' contention. The Fond Du Lacs ceded their reservation containing, as the court found, 100,121 acres of land, under the provisions of the statute the full value of this reservation, certainly as rich in pine timber and agricultural lands as the exceedingly conservative value given by the court to the Mille Lac Reservation, was to become part of the common Chippewa fund, at a most conservative estimate it can not escape notice that the Fond Du Lacs thus contributed to the common fund in the first instance a sum approaching two millions of dollars, which considerably augmented the final per capita distribution of the whole proceeds. The Mille Lac Reservation was not so treated; its rich pine and agricultural lands were not classified and sold as the act provided; they were denied permission to augment the common fund by a contribution, which, while not so large, was nevertheless substantial and in the end would have likewise enured to increase the per capita allowance. The right to dispose of their lands under the act, the same as the Fond Du Lacs disposed of theirs, was denied them. The failure to include the Mille Lac Reservation within the provisions of the act of January 14, 1889, indisputably militates against them rather than for them. They realize nothing for a vast forest of valuable timber and acres of agricultural lands.

The court is unable to reconcile a conceded right of occupancy to Indian lands with the doctrine of limited and circumscribed tenure by license or mere favor. It is certainly most unusual and an anomalous estate not heretofore carved out of Indian lands. It is repugnant to every intendment of the Government in its conduct toward the Indians, and confuses rather than adjust the settlement of Indian affairs. It can not be claimed as just to the Indians, failing, as it must, to bring about that permanent reposed continually sought for in Indian treaties and acts of Congress. The various conflicting opinions of the Department of the Interior were the result of this contention and have carried this controversy through the long years of its existence.

The jurisdictional act is comprehensive, its evident intention being to afford relief to the claimants mentioned therein for damages suffered by them as a band or by the Chippewa Indians of Minnesota. The language of the statute, "a suit or suits to be brought by and on behalf of the Mille Lac Band of Chippewa Indians in the State of Minnesota * * * on account of losses sustained by them or the Chippewas of Minnesota," precludes the idea of technical objections interposed to limit the parties interested. The suit under this jurisdiction may be brought by the Mille Lac Band of Indians for alleged damages to them as a band, or for damages accruing to the Chippewas of Minnesota by reason of injuries to them as a component part of the Chippewa tribes. It is conceded that the Congress possesses plenary power in reference to the disposition of Indian tribal lands and tribal funds. The jurisdictional act passed subsequent to the act of January 14, 1889, wherein distinct provisions are made with reference to the disposition and division of tribal funds and lands, anticipated the very situation which now exists, and intentionally broadened the jurisdiction conferred to the extent of embracing this entire controversy within the terms of the statute, whether the damages occasioned were suffered by the Mille Lac Indians separately or to the Chippewas of Minnesota. If it were not for the act of January 14, 1889, the right of the Mille Lac Indians to prosecute this action in their own name would be indisputable. The act of January 14, 1889, by its terms, however, provides for an equitable distribution of the funds arising from the sale of the lands of the Chippewas therein mentioned by saying in section 7 thereof that the distribution shall embrace "all the Chippewa Indians in the State of Minnesota." Thus it is apparent that the Mille Lac Indians, as a band, were entitled to institute these proceedings under the jurisdictional act, and that the judgment recovered must be subject to distribution, as provided by the act of January 14, 1889. The claimants having brought themselves within the provisions of the act of January 14, 1889, the congressional disposition of their tribal lands and funds follows the same. This would be so even in the event of an individual judgment to the Mille Lac Indians as a band. The jurisdictional act in no wise modifies or repeals the act of January 14, 1889. The law of 1889 being the latest legislation respecting the disposition of Chippewa

tribal lands and funds arising thereunder, would apply the judgment as therein provided, for the act of 1889 controls in the matter
41 of management and distribution of Chippewa lands and funds. (Lone Wolf v. Hitchcock, supra.) Courts are constrained to give effect to jurisdictional statutes where the intent of the legislature can reasonably be inferred from the language thereof to vest authority to judicially ascertain the merits of the controversy. (Supervisors v. Stanley, 105 U. S., 305.) Doubts are to be resolved in favor of jurisdiction, unless some established law is violated. (Endlich on Statutory Construction, sec. 430; Butler & Vale v. United States, 43 C. Cls., 497.)

The situation of the parties herein concerned corresponds to the relief intended by the jurisdictional act. The Mille Lac Indians occupied one of the reservations included in the act of January 14, 1889, and their assent thereto was secured. If no controversy was possible over their title to the reservation, their lands could have been classified, sold, and the proceeds arising therefrom disposed of in exactly the same manner as the other Chippewa Indian lands included in the act, i. e., the Mille Lac's fund would have become part of the general Chippewa fund created by the act of 1889; hence the clause in the jurisdictional act extending the relief to damages occasioned to them or the Chippewas of Minnesota. It is similar in all respects to a suit by the Mille Lac Indians for the use and benefit of the Chippewa Indians of Minnesota. The statute recognized the peculiar relationship between the Mille Lac Band and the other bands of Chippewa Indians as created by the act of 1889 and provided authority to investigate the subject matter of the controversy as presented to the Congress at the time.

The court has experienced great difficulty in attempting to reconcile the testimony in reference to the acreage, and value of the timber thereon, contained in this reservation. The conflicting statements of the witnesses are so wide apart as to make it impossible for the court to accept either the highest or lowest estimate of the amount. Taking into consideration the testimony of the witnesses and the records of the Interior Department submitted herein, we have reached the conclusion that the Mille Lac Indian Reservation contained 61,028.14 acres of land; that 25,000 acres of said land was swamp or agricultural land upon which no pine timber grew; that upon 34,360.89 acres of said land there was standing 100,000,000 feet of pine timber; and that 1,667.25 acres of said land was reserved for various purposes in the various treaties hereinbefore mentioned.

The amendment to the act of January 14, 1889 (25 Stat. L., 642), fixing the minimum price of Norway pine at $4 per thousand feet on the stump and white pine at $5 per thousand feet, made it necessary for a careful investigation of the record in reference to the percentage of the different kinds of pine. Under this subject the record is entirely silent and it has been absolutely impossible to ascertain with any degree of accuracy whatever the quantity of Norway and white pine thereon. In view of this situation the court has treated

all the timber as coming within the lower classification, namely, Norway pine, and allowed therefor at the rate of $4 per thousand feet, making a total of $400,000, to which must be added the amount of $31,250 for the agricultural or swamp lands at $1.25 per acre.

The act of 1889 provided for interest at the rate of 5 per cent per annum on the sums received from the sale of the lands therein
42 mentioned, and the United States expressly agreed to advance the sum of $90,000 per annum to pay said interest until the accumulation should be of sufficient amount to reimburse them for this outlay.

Under this statute there must be added to the principal amount the accumulated interest at the rate of 5 per cent per annum for 18 years 4 months and 17 days, which makes the total sum of $827,580.72, for which amount judgment will be entered in favor of the Mille Lac Indians of Minnesota, to be distributed under the act of 1889, as therein provided, to all the Chippewa Indians of Minnesota.

The defendants' motion for a new trial is overruled. The claimants' motion to amend findings is allowed in part and overruled in part, and amended findings and modified opinion this day filed. The former judgment is vacated and set aside and judgment now entered on the findings for the claimants in the sum of $827,580.72.

Dissenting opinion.

Peelle, Ch. J., dissenting:

When this case was originally argued I was in doubt as to the claimants' right to recover, but yielded to the judgment of the majority. Since the argument of the motion for a new trial I am in still greater doubt, and therefore dissent from the action of the majority of the court in overruling the motion for a new trial.

Without analyzing the various treaties and acts of Congress—referred to and commented on in the opinion of the court—dealing with the Chippewa Indians, of which the claimant band is a part, my reasons for dissenting are briefly these: The jurisdictional act confers upon the court authority to "hear and determine" the suit of the claimant Indians "on account of losses sustained by them or the Chippewas of Minnesota by reason of the opening of the Mille Lac Reservation in the State of Minnesota, embracing about sixty-one thousand acres of land, to public settlement under the general land laws of the United States."

The act does not create a claim, nor does it perform any office except to give the Indians a forum in which to determine their suit on account of losses sustained as aforesaid. Stewart v. United States, 206 U. S., 185; Sac and Fox Indians, 220 U. S., 481.

The lands here in controversy, with others, were by article 1 of the treaty of 1864, 13 Stat. L., 693, ceded to the United States in consideration of certain lands set apart by article 2 to six bands of Chippewas in common, including the claimant band, and of moneys paid

and to be paid them, as shown in articles 3 to 11 of said treaty, in which consideration the claimants herein shared on equal terms with all other Indians parties to the treaty. And in addition thereto, for their peaceful conduct (in compliance with former treaties to keep the peace) during the Sioux outbreak in 1862 they were, by the proviso to article 12 of the treaty (1864), permitted to continue their occupancy of the lands so ceded "so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites." At most, this was a naked right of occupancy, and this is the only right of which the claimants were deprived by opening the the lands to settlement under the public-land laws of the United States.

43 After the treaty of 1864 the lands here in controversy were surveyed, and as early as 1871 entries thereon had been made, and up to 1884, though the Secretary of the Interior had forbidden entries, more than 55,000 acres of the tract had been entered and patents, though withheld, had been issued for over 7,000 acres.

By reason of adverse rulings by various Secretaries of the Interior respecting the rights of these entrymen all entries were suspended to await the action of Congress. Congress, by the act of July 4, 1884, 23 Stat. L., 76, 98, provided in substance that none of the lands should be patented or disposed of in any manner until further legislation by Congress. This act operated to suspend all entries theretofore made until the act of January 14, 1889, 25 Stat. L., 642, which was passed, as expressed in the title, "For the relief and civilization of the Chippewa Indians of the State of Minnesota." Pursuant to this act said Indians, by agreement with the commissioners appointed thereunder by the President, ceded all their interest in and to the reservations so set apart to them in common with such other Indians by article 2 of the treaty of 1864, in consideration of sharing with all said Indians in the proceeds of the timber and surplus lands and allotments as in said act provided; and in respect to the lands here in controversy, as the claimant Indians were, by the proviso, permitted to continue to occupy same by the grace of the Government they were required not to cede but to relinquish their right of occupancy. This was authorized by the act.

In January, 1891, the Secretary of the Interior (Noble) rendered a decision in the case of Walters et al., 12 L. D., 52, holding that the act of 1889 was the further legislation contemplated by the act of 1884, and therefore all entries theretofore suspended were validated; and he directed that if otherwise regular and valid such entries should proceed to patent—that is to say, that prior to the act of 1889 the claimant Indians were, by virtue of the proviso to article 12 of the treaty of 1864, entitled to the use and occupation of the lands. Northern Pacific Railway Co. v. Walters, 13 L. D., 230. But not thereafter.

Congress, by the joint resolution of December 19, 1893, 28 Stat. L., 576, approved the ruling of the Secretary of the Interior holding that the entries made thereon were valid and authorized the issuance

of patents therefor; and later, by the act of May 27, 1898, 30 Stat. L., 745, Congress declared all lands so occupied by the claimant band subject to entry; followed by the act of May 27, 1902, 32 Stat. L., 268, appropriating $40,000 to pay the claimant Indians for their improvements on said lands, on condition of their removal therefrom, granting them, however, the privilege of making their allotments on the lands so occupied or on the White Earth Reservation at their election.

But it is contended by the claimants that the cession by article 1 of the treaty (1864) by all the Chippewas of the Mississippi was defeated as to the claimant Indians by the proviso to article 12, which they contend operated to set apart to the claimant Indians the lands so ceded as a reservation for their occupancy "so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites"; and never having broken the conditions, they were unlawfully deprived of the lands. But, conceding this to be true, the authority of Congress over the tribal property of
44 Indians, as has been held by the Supreme Court in many cases, is plenary, and courts "must presume that Congress acted in perfect good faith in their dealings with the Indians." Therefore courts can not inquire into the wisdom of such legislation, even though some rights may thereby be taken away. Worcester v. Georgia, 6 Pet., 515; Stephens v. Cherokee Nation, 174, 445; Lone Wolf v. Hitchcock, 187 U. S., 553, 565.

There can be no question but that the lands here in controversy were ceded to the United States by article 1 of the treaty of 1864, and the Indian title was thereby extinguished, the lands paid for, and the claimant Indians, independent of their occupancy of the lands here in controversy, were placed on equal terms with all other Chippewas parties to the treaty of 1864.

In the case of the Fond du Lac Indians, 34 C. Cls., 426, the question turned on the acceptance by the Indians of the terms and provisions of the act of 1889, whereby they were permitted to share in the proceeds of nearly four million acres of land in addition to the lands set apart to them in severalty. The claimants herein, independent of their right of occupancy of the lands here in controversy, were given equal rights in and to the lands and timber so to be sold.

The jurisdictional act requires us to hear and determine what losses the Chippewa Indians sustained, if any, "by reason of the opening of the Mille Lac Reservation * * * to settlement under the general land laws of the United States.

What loss have the claimant Indians sustained by reason of opening the lands to public settlement except their right of occupancy, the value of which is not shown, nor is it claimed in this action except as such occupancy is connected with the value of the lands or the timber thereon. But, of course, the Indians had no right to dispose of the lands so occupied, or to sell the timber therefrom for their own benefit, so that any loss which they may have sustained arises, if at all, not under the provisions of any treaty, but alone under the act of 1889.

Section 4 of this act provides, in substance, that as soon as the cession and relinquishment of the Indian title shall have been obtained the Commissioner of the General Land Office shall "cause the lands so ceded to the United States to be surveyed." No provision is there made for the survey of the lands the occupancy of which was alone relinquished by the claimant Indians. The act clearly makes a distinction between the session of the Indian title to the reservation set apart to them by article 2 of the treaty of 1864 and the relinquishment by the claimants of their right of occupancy to the lands here in controversy. The lands so relinquished were not offered for sale under said act, as were the lands so ceded; and this may be taken as a construction of the act by the officers of the Government charged with its execution, especially when coupled with the entries of nearly all the lands involved herein under the public-land laws of the United States prior to the passage of the act of 1889 and the subsequent ratification thereof by act of Congress, as hereinbefore stated.

It is manifest that a recovery in this case amounts to double payment for the lands, in addition to the peaceful occupancy thereof by the claimant Indians for a period of about 25 years. That is to say, the consideration expressed in the treaty of 1864 was for the cession of the six reservations set apart to the Chippewas of the Mis-
45 sissippi by clause 2 of article 2 of the treaty of 1855, of which the reservation here involved was one; and that consideration, be it remembered, was not diminished by the proviso permitting the claimant Indians to continue their occupation of the lands. If not, then any judgment rendered herein for the value of the lands or the timber thereon would, of necessity, be additional to the consideration therefor under the treaty of 1864. This I do not believe was contemplated by Congress by the act of 1889; and, if not, then the jurisdictional act has nothing upon which to operate.

The situation is not relieved by awarding judgment in favor of the claimant Indians and decreeing that the proceeds thereof be shared in common by all the other Chippewas of the Mississippi, since such other Chippewas are not parties to this action, nor were they given any right of occupancy by the grace of the Government by the proviso to article 12. That right was given to the claimant Indians alone, and it is a denial of that right in opening the lands to settlement under the public-land laws that gives rise to this action.

The intent of Congress by the appropriation to pay for the improvements, and the approval of the ruling of the Secretary of the Interior holding the entries made on the lands in controversy as valid must be construed by the court as a legislative construction of the act of 1889 excluding the lands here in controversy from the provisions thereof. This certainly was the view of the executive officers in disposing of the other lands and timber after their classification under the act of 1889, in which the lands here in controversy were not included.

In my view of the case the action of Congress with respect to the claimant Indians, coupled with the ruling of the Interior Depart-

ment, so approved by Congress, is final, and, thus believing, I think the jurisdictional act should be construed in harmony therewith.

For these reasons, I think, the motion for a new trial should be allowed and the petition dismissed.

HOWRY, Judge, also dissents in separate opinion.

Dissenting opinion of Judge Howry.

HOWRY, Judge, dissenting:

The same reasons which influenced me not to join the other members of the court in awarding judgment for $764,210.89 constrain me now, after an increase of the judgment to $825,484.37, to state the reasons why at the outset I was unable, and am yet unable, to concur in the judgment for any amount at all in favor of either the Mille Lac Indians as a band or of the Chippewas of Minnesota as a tribe.

The jurisdictional act creates no liability against the United States, nor is there any admission that the Government is liable for losses of any kind which the plaintiffs might have sustained except such as necessarily arose out of the act of the Government to the injury of the rights of the plaintiffs in opening the Mille Lac Reservation to public settlement under the general land laws of the United States. But the opinion of my brethren of the majority, whilst conceding (on the authority of Stewart v. United States, 206 U. S., 185) that the question of damages alleged to have been suffered by the plaintiffs must be determined by the court upon legal principles, goes a step further when it says that the jurisdictional act " is a warrant of authority to adjudicate results and not determine the means employed to bring about the same." And, further, that the jurisdictional act is so comprehensive as to " make evident the intention " of Congress to afford relief to plaintiffs for the damages of which they complain.

The two propositions involve contrary and different rules from those to be followed under the act conferring jurisdiction and can not stand with the terms of the act if we are to omit from consideration the validity of the joint resolution of 1893 of the Congress ratifying and confirming the entries on the old Mille Lac Reservation and the validity of the subsequent joint resolution of 1898 declaring the old Mille Lac Reservation open to entry as public land under the general land laws of the United States. Nor can we read into the act conferring jurisdiction a supposed intent to obtain
46 results by merely assessing damages for the value of the lands, which by reason of public entry on a part of these lands (by virtue of a final understanding) had the effect finally of causing the removal of the remnant of the plaintiff band from their former reservation.

If it is intended to convey the idea that the jurisdictional act is a warrant of authority to adjudicate results and not determine the means employed to bring about the same, and that the court can merely draw a conclusion of fact as to the amount of timber destroyed or taken, then there is nothing to appeal from on the court's

findings of fact thus restricted to values. The right of appeal conferred by the act would have no meaning if liability according to strict legal principles were not provided for on the merits with results in the form of damages to follow only when the court should first find the existence of the necessary liability. The intention of Congress to afford relief can not, therefore, be said to be evident, because the act conferring jurisdiction neither undertook to determine rights in advance nor to create new rights of any kind, but merely to provide for a full trial on the merits.

As in the case of the Sac and Fox Indians, 220 U. S., 489, something must be shown in the present case amounting to a right in law because a merely moral claim can not be the foundation for a possible recovery.

As a matter of fact, there is no question of the moral right involved that can be considered separately from the legal right. There is no room for the court to speculate upon the matter of moral obligation inasmuch as by the opinion of the majority it is in any event "quite doubtful if any advantages (by the judgment) will accrue to the Mille Lac Indians" because of the provisions of the act of January 14, 1889, 25 Stat., 642, by which the Mille Lacs were given an interest in the proceeds of the sale of about 4,000,000 acres of land, accompanied with the further right to have allotments in severalty to other lands given to them for occupancy, and that all Chippewa Indians in Minnesota have such a right to participate in the judgment rendered that the amount accruing to the Mille Lacs (by reason of the opening up of the old reservation occupied by them) would amount practically to nothing.

My objections to the judgment are:

(1) That the intent and scope of the various treaties between the United States and the parties for whom judgment is rendered contemplated and provided for the opening of the Mille Lac Reservation to public settlement by the whites, and that in the exercise of full plenary power over the subject matter Congress has so interpreted its obligations, duties, and rights as to provide, by valid and constitutional acts, full, fair, and adequate compensation to plaintiffs which the court can not disregard but must carry out.

Many cases establish the rule that the plenary authority over the tribal relations of the Indians is a political power not subject to be controlled by the judicial department of the Government. So far has the court of final review gone it was said in Cherokee Nation v. Hitchcock, 187 U. S., 294, that "the power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to
47 determine, and not one for the courts." The principle had great emphasis in the case of Lone Wolf v. Hitchcock, 187 U. S., 565, where upon the authority of Stephens v. Cherokee Nation, 174 U. S., 445, the court said that it "must presume that Congress acted in perfect good faith in dealing with the Indians of

which complaint is made, and that the legislative branch of the Government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary can not question or inquire into the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress, and not to the courts. The legislation in question was constitutional."

In Choctaw and Chickasaw Nations, 179 U. S., 494, the court said that "the Court of Claims is without authority to determine the rights of parties upon the ground of mere justice or fairness, much less under the guise of interpretation to depart from the plain import of the words of the treaty. Its duty was to ascertain the intent of the parties according to the established rules for the interpretation of treaties," concluding with the further statement that if the treaty there under consideration "did injustice to the Choctaws and Chickasaws the remedy is with the political department of the Government."

In the last-mentioned case the treaty had, as between the United States and the Choctaws and Chickasaws, provided for cession of a vast domain, which included a payment to the tribes of the inconsiderable sum of $300,000, which sum (according to what these tribes yet say) was never paid to the Choctaws and Chickasaws.

(2) My next objection to the judgment as rendered is that the treaty by which the Mille Lacs relinquished their right in and to the old reservation did not provide for an exclusive right in them to the lands, nor did it wholly exclude said lands from sale or disposal by the United States, and further, that as the Mille Lacs have received an ample equivalent by way of consideration for the abandonment of their occupancy of their former reservation, they should not receive another and double consideration for the mere sentiment involved in their desire to remain where they were in barbarism and idleness at Government expense.

Judicial notice will be taken of most everything upon which the findings are predicated, but for convenience and a better understanding of the merits attention is directed to those parts of public documents supposed to be material in determining the issues.

The treaty of September 30, 1854, 10 Stat., 1109, is important in that it partitioned the Chippewa lands in Minnesota between the Chippewas of Lake Superior and the Chippewas of the Mississippi. The scheme of that treaty as it appears was to encourage each family to cultivate the soil and to advance the Indian civilization.

The treaty of February 22, 1855, 10 Stat., 1165, mentioned in the second finding of the court, was made with the Chippewas of the Mississippi, and not with the Gull Lake, Mille Lac, Sandy Lake, Pokamegin Lake, Red Lake, and Rice Lake bands of Indians. Nor were the tracts of land reserved as a home for the Mississippi Chippewas designated as reservations until the treaty of 1863 and 1864.

They were held in common by the whole tribe of the Chippewas of the Mississippi.

48 The map prepared by the General Land Office and filed as an exhibit in this case throws much light upon the questions to be considered. In fact, it is almost impossible without it to obtain a clear idea of the numerous cessions made by the various treaties between the United States and the Chippewa Indians.

The third finding of the court is objected to by the defendants as contradictory to the official reports. The Government contends that the outbreak of the annuity Sioux in Minnesota did not start until August, 1862, and that no massacres or depredations were committed until August 17, 1862, and that a union of the Chippewas with the hostile Sioux was defeated by the hereditary enmity of the Chippewas and the promises of certain white men who had influence with them that a treaty would be made redressing their grievances. The history of the matter, if important, is to be found in Heard's History of the Sioux War and Massacres, pages 52, 339; Sisseton and Wahpeton Indians v. United States, 42 C. Cls., 416; 108 U. S., 561. The finding sets forth that Shaw-vosh-kung went to the relief of Fort Ripley with 800 of his band, where the Commissioner of Indian Affairs happened to be with 35 soldiers.

Defendants urge that this statement incorporated in the findings is not sustained by the contemporaneous reports of the Commissioner of Indian Affairs, who was on the ground at the time. The report of the Secretary of the Interior for 1862, pages 223, 224, 227, 228, 229, 230, 231, discloses a state of affairs apparently establishing two things: First, that the Mille Lac Band was restrained by the presence of a number of United States troops equal to their own number from acts of hostility; and, secondly, that there were no promises made to them that they might remain on the land then occupied by them. Whether any effect can be given to these reports in the appellate court on the judicial notice there taken of what the reports show must be determined there. But the report of the Commissioner of Indian Affairs on the ground acting for the United States at the time of the Chippewa troubles, together with the reports of the Secretary of the Interior, are both important in arriving at the intent of the Government and the Indians in the subsequent treaties of 1863 and 1864.

The treaty of 1863 was superseded by article 14 of the treaty of 1864. The White Earth Reservation was not set apart for the home of the Mississippi Chippewas by the treaty of 1864, but was set apart for them by the treaty of March 19, 1867, 16 Stat., 719. The commission appointed under the act of May 15, 1886, 24 Stat., 44, described the White Earth Reservation as "set apart for the permanent home of the Mississippi Chippewas by the treaty of March 19, 1867, 16 Stat., 719, as part of the consideration for a large and valuable tract of land ceded to the Government (Sen. Ex. Doc. No. 115, 49th Cong., 2d sess., 14)." In the agreements made under the act of January 14, 1889, between the United States and the different bands, including the Mille Lacs, the surplus lands of the White Earth Reser-

vation not needed for allotment there ceded were described as having been set apart for the Indians by the treaty of March 19, 1867 (H. R. Doc. No. 247, 51st Cong., 1st sess., 45–48).

Defendants object to that part of Finding VI showing that the Mille Lac Indians believed they were reserving to themselves the Mille Lac Reservation in the execution of the treaty of 1863
49 and treaty of 1864, because (1) this treaty was not made with the Mille Lac Indians but with the Mississippi Chippewas, who had a common interest in each of the six reservations ceded by the treaty of 1864, and the right to occupy the old reservation was granted as a favor to one band, and not reserved by the Indians at all; and (2) because the statement is a conclusion of law drawn from certain acts of the Indians in their dealings with the Government and should have no place in a finding of fact; and (3) that the treaty of 1864 must be interpreted according to the recognized rules of construction without reference to what each party to the agreement believed it meant, citing Old Settlers case, 148 U. S., 427; Choctaw and Chickasaw Nation v. United States, 179 U. S., 494. Defendants also object to the second paragraph of the sixth finding, because of its immateriality as to what the commissioner for the United States thought of the purpose of article 12 of the treaty of 1864 or what the Indians thought of it in reaching an agreement under the act of January 14, 1889. The fifth paragraph of the sixth finding is also objected to by the defendants, because the act of May 27, 1902, and the proceedings thereunder are separate and distinct transactions from the negotiations of 1886. The report of the commissioners appointed under the act approved May 15, 1886, 24 Stat., 44, to negotiate with the Chippewa Indians in Minnesota for modifications of existing treaties and changes of reservation, discloses the purpose of securing an agreement for the removal of that portion of the Mille Lac Band (about 200 in number) then residing on the old White Earth Reservation (Sen. Ex. Doc. No. 115, 49th Cong., 2d sess., 21, 27, 32, Serial No. 2449). This report also discloses that though they refused to enter into an agreement there were not more than 200 of the entire band pretending to occupy the Mille Lac Reservation, and but few of those were actually living there but were scattered through the country south of the reservation; that with the exception of three or four shanties there was not a house on the reservation; that these remnants of the band were living summer and winter in birch-bark wigwams; and that the women and children were in a state of barbarism.

The act of July 4, 1884, 23 Stat., 76, 98, as originally drafted appropriated $15,000 for the removal and settlement of the White Oak Point and Mille Lac bands on the White Earth Reservation. The appropriation was afterwards stricken out by the conference committee, and the act as passed provided "That the lands acquired from the White Oak Point and Mille Lac Bands of Chippewa Indians on the White Earth Reservation in Minnesota shall not be patented or disposed of in any manner until further legislation by Congress."

(House bills, 48th Cong., vol. 199; Conference Rep., Cong. Rec., vol. 15, pt. 6, pp. 5800, 5801.) The appropriation was evidently stricken out because the Mille Lac Band had already been settled on the White Earth Reservation, and only a few scattered Indians remained on the old reservation.

Pursuant to the act of January 14, 1889, three commissioners appointed by the President took a census of the Chippewa Indians of Minnesota. The total number of Chippewa Indians in Minnesota was found to aggregate 8,304, and the quantity of land in all the Chippewa reservations in that State aggregated 4,747,931 acres, of which the Mississippi Chippewas were interested in 796,672 acres (H. R. Doc. No. 287, 51st Cong., 1st sess., 9, 15, 27); and thereafter, on different dates, by different agreements with the different bands, there were ceded and relinquished to the United States the Grand Portage Reservation, the Fond du Lac Reservation, the Boise or Wood Fort Reservation, the Deer Creek Reservation, and the surplus lands of the White Earth and Red Lake Reservations not required for allotment in severalty to said Indians who had become parties to the agreements. Each separate agreement made with each of the bands of the Chippewas in Minnesota was separately approved, in accordance with the act of January 14, 1889, by President Harrison, including the relinquishment of the right of occupancy of the former Mille Lac Reservation under article 12 of the treaty of May 7, 1864. The agreement entered into with the Mille Lac Band under the act of January 14, 1889, 25 Stat., 612, discloses the relinquishment of the right of occupancy of the Mille Lac Reservation. The signatures of 189 adult Mille Lac Indians appear to the agreement, which was approved by the President March 4, 1890 (H. R. Doc. No. 247, 51st Cong., 1st sess., 45–48).

By the treaty of May 7, 1864, six reservations were ceded to the United States, but prior to that treaty the Chippewas as a tribe owned an undivided communal interest in each of the six reservations. By the treaty the Chippewas of the Mississippi as a tribe ceded to the United States the Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake, Pokagomin Lake, and Rice Lake Reservations. By article 2 a reservation was set apart by boundaries to the six bands ceding the lands, including the Mille Lacs, and by article 3 these Mississippi Chippewas, including the Mille Lacs, were given a money consideration. Then followed stipulations for expenditures on the reservation set apart by article 2 in improving the property for cultivation and residence, specifying 70 acres for the Mille Lac Band.

The twelfth article of this treaty of May 7, 1864, 13 Stat., 693, upon which the claim is predicated, provided as follows:

"It shall not be obligatory upon the Indians parties to this treaty to remove from their present reservation until the United States shall have first complied with the stipulations of articles four and six of this treaty, when the United States shall furnish them with all necessary transportation and subsistence to their new homes and subsistence for six months thereafter: Provided, That owing to the

heretofore good conduct of the Mille Lac Indians they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites."

It is conceded that the Government complied with the stipulations of articles 4 and 6 of the treaty; and, though a contemporaneous privilege was granted to the Mille Lacs, it was evidently not the intention of the parties to the treaty, taking into consideration all the circumstances, that the Mille Lac Band should forever remain where they were and yet reap the benefits of those provisions of the treaty which looked to their true interests, civilization, comfort, and ultimate location somewhere else.

The treaty, which included article 12, was a cession by the Mississippi Chippewas of their six reservations to the United States. It is a mistake to assume that by the first part of this article the Government receded (or intended to recede) to the Mille Lac Band
51 the reservation. By the cession the United States either acquired a right to the reservation as a reservation or it did not acquire a right. A party can not be both grantor and grantee of the same premises, in the same right, in the same stipulation. In California & Oregon Land Co. v. Worden, 85 Fed. Rep., 94, it was said that such a thing was impossible. The stipulation permitting the small number of Mille Lacs to remain on lands (which for a consideration the band had just relinquished to the United States) was not a recession of such title as the band had before, nor a recession of such character as that the band could lawfully object to the entry of the whites where the land was not necessary for Indian use by the election of the band to remain. The treaty ceding the land to the United States was purposeless if, by the same instrument or by any contemporaneous qualification, the United States did not acquire the right to open the land to such public settlement as would not interfere with the limited use and occupancy of the band. The purpose of the treaty agreement was to open the lands to public settlement, except such land as the band should cultivate as long as it remained.

If defendants did not acquire the right to open all that part of the old reservation (to white settlement) not necessary for the occupancy and subsistence of the band as long as the band remained, then the conditions imposed by the twelfth article must be held to have operated to destroy the manifest intention of the Government at the time to provide homesteads for white settlers and the manifest intention of the Mille Lac Band to adjust themselves to the expectations of the United States in that behalf. The United States could not have intended that the band should remain indefinitely as vagrants and practically in a state of barbarism. From all that occurred the manifest intent stated must control.

The thing the Government did do in taking over the six reservations was to give a money consideration for the cession of these lands to the United States, and then, by way of grace, provide that, because of past good conduct, the Mille Lacs should not be compelled

to remove so long as they should not in any way interfere with or molest the persons or property of the whites who might come on the reservation by the permission of the Government.

Why should the Government stipulate in the proviso that if the band remained they should neither interfere with nor molest the persons and property of the whites if the Government, by necessary implication from the language used, had not reserved the right to place whites somewhere on the reservation? Certainly at the time of the treaty there were no whites there, because the reservation up to the promulgation of the agreement was Indian country. Such whites as may have unlawfully come in as trespassers on the reservation before the treaty was made were without the protection of the Government and continued withiut protection of any kind until opportunity was afforded to each white person unlawfully there to have entry by Government permission.

By the treaty, 16 Stat., 707, under which the case of the California & Oregon Land Co. v. Worden, supra, was decided there was a proviso that "within the country ceded a tract of land was set apart as a residence for the tribe making cession to be held and regarded as an Indian reservation." As to the land thus reserved and expressly declared to be a reservation, the right of occupancy
52 originally in those who made the cession of a large tract remained precisely the same after the treaty as before the cession for the small tract reserved for residence purposes. The case at bar is entirely different. Here the privilege of remaining on the premises did not have the effect of perpetuating the right of the Mille Lacs to the 61,000 acres, because of the stipulation necessarily implied that the whites who might be put on such part of the land as was not actually in Indian use should not be interfered with or molested by the band. Any other interpretation would have had the effect of destroying the treaty entirely. Nor did the right to remain confer any such privilege as gave the band the right to the timber taken off by trespassers or by permission of the Government, except such timber as was incidental to the use of the land.

In United States v. Cook, 19 Wall., 591, the Government, by treaty with the Menomonees, 7 Stat., 344, paid $20,000 for a cession of land. The Oneidas, to whom a part of the Menomonee cession had been apportioned, ceded to the United States all the lands set apart to them except a small tract to each individual, which they reserved to themselves to be held as other Indian lands. A small number of the occupants cut timber from a part of the reservation not occupied in severalty, which they removed and sold to Cook. Replevin by the United States against Cook was brought to recover possession of the timber, which had been converted into saw logs. Following the early case of Johnson v. McIntosh, 8 Wheat., 574, the Supreme Court held that, for the purposes of agriculture, tribes as occupants might clear the lands of the timber to such an extent as might be reasonable. But the improvement of the land to justify any cutting of the timber must be done in good faith, as the improvement was the principal

thing and the cutting of the timber the incident only. The court further held that the severance of timber for purposes of improvement only was a legitimate use, but that if timber should be severed for purposes of sale the cutting would be wrongful and the timber when cut would become the absolute property of the United States.

If the Mille Lac Band in the present case had cut timber for sale upon the faith of their right to remain as occupants such timber would instantly have become the property of the United States, discharged of any Indian rights conferred by the privilege given to remain, because the fee to the land was in the Government. As by the privilege to remain the Mille Lac Band could not acquire any such right in the timber as to justify the court in rendering a judgment in their favor for the waste, how then are we to measure the value of the occupancy?

By the act of March 3, 1865, 13 Stat., 541, appropriations were made for fulfilling the stipulations of the treaty of May 7, 1864, including appropriations for removal and subsistence. Thereafter appropriations were made annually for the benefit of the tribes, including plaintiffs, pursuant to the same treaty. 14 Stat., 273, 496; 15 Stat., 202; 16 Stat., 19, 339, 549; 17 Stat., 169, 443.

Subsequently another treaty between the United States and the Chippewas of the Mississippi was proclaimed April 18, 1867, 16 Stat., 719, whereby the Chippewas received large benefits pursuant to the scheme of removal.

53 On March 31, 1884, out of 61,028.14 acres contained in the former Mille Lac Reservation 55,976.42 acres had been entered under the general land laws, of which 7,792.16 acres had been patented.

As further showing the intent of the Mille Lac Band, 25 had removed to White Earth prior to 1872, and by May 10, 1882, nearly 400 had removed to the latter reservation. (H. R. Doc. 1388, 60th Cong., 1st sess., pp. 8, 12.) Prior to December 1, 1886 (as previously stated), not more than 200 of the Mille Lacs remained to avail themselves of the privilege of remaining, and but few of these lived on their former reservation permanently. (Report of Commissioners, Sen. Ex. Doc., 115, 49th Cong., 2d sess., p. 21.) On August 30, 1902, there were 125 male adults on the old Mille Lac Reservation and quite a number of these had received allotments on the White Earth Reservation. On January 31, 1911, there were 174 of the Mille Lacs scattered around on the former reservation. (Report of Commissioner Hall.) The endeavor on the part of the Government in the latter part of the year 1886 was not really an effort to remove from the old Mille Lac Reservation any of the band, because, as hereinbefore shown, but 200 of the entire band had not removed to their new homes on the White Earth Reservation. The 200 unprovided for were, according to official reports, scattered through the country south of the reservation and the efforts of the Government to remove the remnant of the band were principally directed to collecting them together from where they principally were south of their old reserva-

tion and giving them allotments on the land provided for them by treaty and by legislation.

The allotments of land came under the provisions of a treaty with the Chippewa Indians proclaimed April 18, 1867, and certain acts of Congress relating to such Indians. On February 8, 1887, Congress passed an act "To provide for the allotment of lands in severalty to Indians on the various reservations." This act was amended February 28, 1891. Then followed amending acts unnecessary to be stated. Then came the act of April 28, 1904, entitled "An act to provide allotments to Indians on White Earth Reservation in Minnesota." This was known as the Steenerson Act.

By an act approved May 27, 1902, 32 Stat., 268, the sum of $40,000 was appropriated to pay the Mille Lac Band for improvements made by them on their former reservation upon an appraisement by the Secretary of the Interior; but there was a provision that any one of them who had leased or purchased any Government subdivision of land within the old reservation from or through a person having title from the Government should not be required to move. Thus it appears that the individuals of the Mille Lac Band were treated fairly and justly by the Government throughout, because every member of the band had the privilege of staying there by purchase, as the land was opened up for public settlement. Then they were given equal rights in the lands provided for the other Chippewas. The band also acquired rights in the timber to be sold from the new reservations which had been provided by the Government for all the Chippewas. The band participated in the annuities allowed by the treaties of 1863 and 1864 for purposes of subsistence, and if its members did not avail themselves of the benefit of schools, blacksmith shops, agricultural implements, and other advantages
54 growing out of the removal to the White Earth Reservation it was their neglect or improvidence, as by removal they could have had these benefits at any time they desired to share in such advantages.

The improvements at the time the appraisement was made were practically of no value, and were assessed at what they had been, the object being to secure the removal of the Indians to the White Earth Reservation.

The clause in the agreement that nothing contained therein should be construed to deprive said Indians of any benefits to which they might be entitled under existing treaties or agreements not inconsistent with agreement then entered into, or the act of May 27, 1902, is the same provision which has been inserted in every agreement made with Indians since 1896, and has no special significance in this agreement.

(3) My third objection to the judgment is that it represents the value of the Mille Lac Reservation itself and not the value of the right of occupation given to the small band who claimed the right to remain. The judgment does not inure strictly to the benefit of the Mille Lac Indians, nor is it yet restricted to the benefit of the Chip-

pewas of the Mississippi, who held title to the reservation prior to its cession to the United States, in 1864, but does provide for all the Chippewas of Minnesota. Most of the Minnesota Chippewas never at any time had any interest in the Mille Lac Reservation. The Lake Superior, Red Lake, and Pembina Bands certainly had no interest. None of these had any interest in the occupation of the Mille Lac Band, who were of the Mississippi Chippewas. The treaty of September 30, 1854, supra, discloses that the Chippewas of Lake Superior and the Chippewas of the Mississippi had partitioned their land in Minnesota between themselves, the Lake Superior people acquiring lands east of a defined boundary and the Chippewas of the Mississippi acquiring the lands west of that boundary. The treaty of February 22, 1855, supra, discloses that the Chippewas of the Mississippi ceded their lands west of the defined boundary line to the United States, out of which five reservations were set apart for their use, to be held in common—the Gull Lake, Sandy Lake, Rabbit Lake, Pokamogin Lake, and Rice Lake Reservations; and another, also to be held in common, the Mille Lac Reservation, which had been ceded by the Chippewas, prior to the partition of their lands, by the treaty of July 29, 1837, supra.

The beneficiaries in the judgment are principally those Indians who were guilty of the outbreak in 1862. Thus the right of occupation given as a reward for good conduct to a small band is made by the judgment to have been an occupation for the benefit of the Indians engaged in the massacre of the whites.

The claims of the Chippewa Indians for compensation arising from an alleged difference in area of the reservation as actually set apart for them and that provided to be set apart under treaty with the Chippewas of Lake Superior and the Mississippi was heard by this court by virtue of a special jurisdictional act to determine the difference between the area actually set apart to the Fond du Lac Band and that provided to be set apart in the treaty there mentioned to that band. 34 C. Cls. R., 431. The question in that case involved the acceptance by that band of the terms of the later act of 1889. The Mille Lac Band was given equal rights in and to the lands and timber provided for the Fond du Lacs and other Chippewas besides the reservation to the Mille Lacs of their right to separate allotments. It would now seen that the act of 1889 settled adversely the rights of all the parties declared by the majority of this court to be entitled to share in the present judgment. The other Chippewas of Minnesota, including the Fond du Lac Band, certainly have no further claim growing out of the occupancy of the Mille Lac Band of the old reservation.

Undoubtedly the Congress have the power at will to make such payment for Indian claims within the category of rights as may seem meet to the legislature as well as the right to pay demands by way of gratuity. But when a claim has been presented to a court having jurisdiction and the right of such claimant has been determined by the entry of judgment the right involved in the matter as a claim strictly speaking is res judicata.

But whether the rights of all or any of the Chippewas have or have not been adjudicated under the treaty of 1889, the later acts negative the contentions of all the parties (including the Mille Lac Band) to any further lands or to any other and further compensation for the value of such lands as are not now in their possession.

55 VII. *Judgment of the Court.*

THE MILLE LAC BAND OF CHIPPEWA INDIANS, IN THE State of Minnesota v. THE UNITED STATES. } No. 30447.

At a Court of Claims held in the City of Washington on the 6th day of May, 1912, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the claimants and do order, adjudge and decree, that the claimants, The Mille Lac Band of Chippewa Indians in the State of Minnesota, do have and recover of and from the United States the sum of eight hundred and twenty-seven thousand five hundred and eighty dollars and seventy-two cents ($827,580.72), which judgment follows the provisions of section 7 of the act of January 14, 1889.

BY THE COURT.

56 VIII. *Application for, and allowance of, appeal.*

From the judgment rendered in the above-entitled cause on the 6th day of May, 1912, in favor of claimant, the defendants, by their Attorney General, on the 12th day of July, 1912, make application for, and give notice of, an appeal to the Supreme Court of the United States.

JOHN Q. THOMPSON,
Assistant Attorney General.

Filed July 12, 1912.
Ordered:
Allowed in vacation.

STANTON J. PEELLE,
Chief Justice.

JULY 13, 1912.

57 Court of Claims.

THE MILLE LAC BAND OF CHIPPEWA INDIANS IN THE State of Minnesota vs. THE UNITED STATES. } No. 30447.

I, Archibald Hopkins, Chief Clerk, Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-en-

titled cause; of the findings of fact and conclusion of law filed by the court; of the opinion of the court; of the dissenting opinions by Peelle, Ch. J., and Howry, J.; of the final judgment of the court; of the application of the defendants for, and the allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 26″ day of July, 1912.

[SEAL.] ARCHIBALD HOPKINS,
Chief Clerk, Court of Claims.

(Indorsement on cover:) File No. 23,311. Court of Claims. Term No. 736. The United States, Appellant, vs. The Mille Lac Band of Chippewa Indians in the State of Minnesota. Filed July 29th, 1912. File No. 23,311.

○

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1912

—o—

THE UNITED STATES,
Appellant,

vs.

THE MILLE LAC BAND OF CHIPPEWA INDIANS IN THE STATE OF MINNESOTA.

—o—

No. 736

—o—

Appeal from the Court of Claims
Motion to Advance

The appellee respectfully moves the Court to advance the above entitled cause for hearing for the following reasons:

1. The Act of February 15, 1909, (35 Stat. L., 619), entitled "An Act for the relief of the Mille Lac Band of Chippewa Indians, etc." under which this case was referred by Congress to the Court of Claims, provides that, "The said cause shall be advanced on the docket of the Court of Claims and of the Supreme Court of the United States, if the same shall be appealed."

2. On May 29, 1911, after this case had been heard at length in the Court of Claims, that Court filed its findings of fact and conclusions of law, and entered judgment for claimant in the sum of $764,210.89, the same being the value of 34,480.89 acres of pine land and 100,000,000 feet of pine timber for which the appellants should have accounted to the appellee.

On July 24, 1911, the defendants, the United States, moved for a new trial, which motion was heard on January 22, 1912, and on May 6, 1912, the motion for new trial was overruled, the former judgment vacated and the findings of fact amended so as to increase the judgment in favor of claimant to the sum of $827,580.72.

This judgment is drawing interest at the statutory rate, and will continue so until a final decision of the case in this Court.

3. The case arises out of the Act of January 14, 1889, (25 Stat. L., 642), known as the Nelson Act, under which the United States is a trustee for the sale and disposition of the property of the claimant, and the judgment above named is rendered on the theory that the United States have not fulfilled their trust in the matter. If this be finally held to be true, the Indians have long been deprived of their rights and are entitled to as early a settlement in the premises as the Court's convenience will permit.

GEORGE B. EDGERTON,
F. W. HOUGHTON,
HARVEY S. CLAPP,
DANIEL B. HENDERSON,
Attorneys for Appellee.

January, 1913.

In view of the provisions of the Act of Congress under which this case was referred to the Court of Claims:

> "And from any final judgment or decree of the Court of Claims either party shall have the right to appeal to the Supreme Court of the United States, and said cause shall be advanced on the docket of the Court of Claims and of the Supreme Court of the United States if the same shall be appealed."

and of the fact that a judgment therein has been rendered by the Court of Claims in favor of the Indians as set forth above, the Government concurs in this motion.

INDEX.

	Page.
STATEMENT	1–26
Jurisdictional Act, Feb. 15, 1909 (35 Stat., 619)	1
THE QUESTIONS INVOLVED	2–3
THE TREATIES—	
Of July 29, 1837 (7 Stat., 536)	4
Of Sept. 30, 1854 (10 Stat., 1109)	4
Of Feb. 22, 1855 (10 Stat., 1165)	4
Of March 11, 1863 (12 Stat., 1249)	5
Of May 7, 1864 (13 Stat., 693)	5–6
Of March 19, 1867 (16 Stat., 719)	7
THE GOOD CONDUCT OF THE INDIANS	8–9
REMOVAL OF THE INDIANS FROM MILLE LAC	9–10
DEPARTMENTAL DECISIONS AND ACTS OF CONGRESS	10–26
Lands opened to settlement in 1871	10–11–37
Secretary Chandler's decision, appeal of Folsom, March 1, 1877 (Appendix B)	11–12–37
Secretary Schurz's decision, cancelling entries	13–38
Secretary Teller's decision, May 10, 1882, reinstating entries (Appendix C)	13–38
Secretary Teller's decision, August 7, 1882	13
Appropriation act, July 4, 1884 (23 Stat., 78)	14
5 Land Decision, 541 (Robert Lowe)	14
5 Land Decision, 102 (State of Minnesota)	15
Appropriation act, May 15, 1886 (24 Stat., 44)	15
Secretary Lamar's decision, Oct. 23, 1886 (Appendix D)	16
Nelson Act of January 14, 1889 (25 Stat., 642)	16
Amendment of June 27, 1902 (32 Stat., 400)	16–19
Cession to United States by Mille Lac Band of all title, etc., to four townships of White Earth Reservation, etc	21

A

STATEMENT—Continued.

DEPARTMENTAL DECISIONS AND ACTS OF CONGRESS—Continued. Page.

8 Land Decision, 409, treating act of July 4, 1884, as yet in force 21

10 Land Decision, 3, recalling above decision 21–22

12 Land Decision, 52 (Secretary Noble holding that act of 1889 was further legislation required by act of 1884) 22

Secretary Noble further held, right given any Indian by sec. 3, act of 1889, to make allotment on reservation on which he resided did not apply to Mille Lac .. 23

Secretary Noble, Jan. 21, 1891, reaffirms his decision holding lands should be disposed of as other public lands (Appendix E) 24

Secretary Noble, Sept. 3, 1891 (13 Land Decision, 230), held that railroad company was not authorized prior to act of 1889 to make lieu selections on Mille Lac Reservation 24

Secretary Noble, April 22, 1892 (14 L. D., 497), wrote Commissioner of General Land Office, decision in Northern Pacific R. R. Co. *v.* Walters was to be followed 24

Secretary's first ruling adopted as correct by Congress, act of Dec. 19, 1893 (28 Stat., 576) 24–25

Resolution, May 27, 1898 (30 Stat., 745) .. 25–26

Indian appropriation act, May 27, 1902 (32 Stat., 268), providing for payment to Indians of $40,000 for improvements made by them on Mille Lac Reservation, etc 26

Agreement, Aug. 30, 1902, by which Mille Lac Indians still residing on former Mille Lac Reservation were to remove to White Earth Reservation, etc 27

	Page.
ASSIGNMENT OF ERRORS	28–29
ARGUMENT	30–54
I. The jurisdictional act creates no liability, but simply furnishes a forum for the adjudication of the claim.	
Stewart *v.* United States, 206 U. S., 185, 194	30
The Sac & Fox Indians, 220 U. S., 481, 489	30
Court of Claims in error in holding in effect act of 1909, is a legislative decision that something is due Indians	30
Jurisdictional act not intended to strip Government of all legal and equitable defenses	30
(*a*) Congress has plenary power and control over Indian tribes	30
Cherokee Nation *v.* Hitchcock, 187 U. S., 294	30
Lone Wolf *v.* Hitchcock, 187 U. S., 565	30
Congress did not intend by act of 1909 to authorize courts to inquire into justice and fairness of dealings with Indians	30–31
United States *v.* Choctaw and Chickasaw Nations, 179 U. S., 494, 531–535	31
United States *v.* Old Settlers, 148 U. S., 427, 466	31
Congress subsequent to 1870 (when land was first opened to settlement) ratified all prior entries and opened unoccupied land to settlement	32
Joint resolution, Dec. 19, 1893 (28 Stat., 576), confirmed all entries made on Mille Lac in 1891 and 1892	32

ARGUMENT—Continued. Page.

Joint resolution, May 27, 1898 (30 Stat., 745), declares land within Mille Lac Reservation subject to entry, confirming all entries theretofore made 32

(*b*) If legislation, above mentioned, be not conclusive, then question before court is whether United States by opening Mille Lac tract, infringed legal rights of Indians 32

II. Mille Lac Reservation was ceded to United States by entries of 1863 and 1864, and became public land open to settlement. Mille Lac Band acquired no title thereto; simply permitted to remain thereon temporarily 33

Claim of Indians is based upon proviso of article 12 of treaty, and correctness of above proposition depends upon proper construction of that proviso 33

By treaty of 1855, nine tracts, under supervision of one agent, had been set apart for Indians; and settlers were approaching from South 33

Commissioner of Indian Affairs, Dole, Sept. 14, 1862, by letter to Gov. Ramsey, of Minnesota, shows need for Indians' removal 33

Report, Secty. of Interior, 1862, pp. 227, 228 34

Objects of treaty are apparent from its provisions 34

Six reservations occupied by Mississippi Bands were ceded to United States (art. 1), for which larger reservation was created near those occupied by Pillager and Lake Winnibigoshish Bands (art. 2); and large payments were made to Indians and annuities were extended (art.

ARGUMENT—Continued.

Page.

3); United States agreed to prepare new lands for cultivation, etc. (art. 4); large sums were to be expended for implements and animals (art. 5); sawmill to be built, roads established, etc. (art. 6)... 34–35

Absolute cession of land to United States and intention to remove Mille Lac Band to new reservation, not destroyed by proviso... 35

Construction contended for by claimants would defeat objects of treaty... 36

Treaty was a purchase from Indians of title to six ceded reservations; land so purchased became public land open to settlement... 36

Reservation was so regarded by officers of Interior Department... 37

Land surveyed in 1870 and settlements began in 1871; shortly thereafter the then Secty. of Interior suspended further entries... 37

Secty. Chandler's decision on appeal of Folsom in 1877, sustaining Government's contention... 37

Reinstatement of all enteries by Secty. Teller in 1882... 38

Congress suspends, in 1884, all entries pending further legislation... 38

Erroneous statements in majority opinion, relative to decisions of Secretaries Schurz and Teller... 38, 39

Decision of Secty. Lamar in 1866... 39

Construction given to treaty by Interior Dept. will be given great weight by courts, and evidently was recognized by majority of Indians, etc... 39

Brown *v.* United States, 113 U. S., 568... 39

Upon full consideration of the foregoing, follows that rights of Indians were not infringed... 40

ARGUMENT—Continued. Page.

III. The Mille Lac Band abandoned any claim to reservation by voluntary removal therefrom.

Prior to 1899, majority of Mille Lac Band had voluntarily removed to White Earth Reservation; thereby claim of whole band to reservation was abandoned.... 40

United States deals with tribes, not individual Indians..... 40

Blackfeather *v.* United States, 190 U. S., 368, 377..... 40

IV. By accepting conditions and benefits of acts of 1889 and 1902, Indians abandoned all claim to Mille Lac tract..... 41

(*a*) *Nelson Act of 1889 was final settlement with all Minnesota Chippewas. Mille Lac Band accepted its terms, agreeing to move to White Earth, and thereby ended all right of occupancy of Mille Lac tract*.. 41

Situation of Mille Lac Band and of other Indians at the time of the passage of the Nelson Act, and offer of the United States to the Indians under such act..... 41–42

Acceptance of such offer by Mille Lac Band and other Indians..... 42

When Indians voluntarily agreed to remove and accept benefits of Nelson Act, proviso of article 12 was at an end and there arose a compulsion to remove..... 42

Therefore there was no necessity for cession of the old reservation, etc.. 43

Lands on Mille Lac tract were not to be sold under Nelson Act; only lands which were *ceded* to United States were to be sold..... 43

14 Land Decision, 497..... 43

ARGUMENT—Continued.

	Page.
Congress by resolutions of 1893 and 1898 declared that entries made on this land were valid and land was open to settlement	44
Report of Committee on Indian Affairs of House of Representatives on resolution of Dec. 19, 1893	44
Cong. Rec. vol. 26, pt. 1, pp. 35, 36; 53d Cong., 2d sess	44
United States *v.* Binns, 194 U. S., 486	44
Report of Secty. of Interior, on resolution of May 27, 1898, from which appears Congress did not recognize any rights of Mille Lac Indians in old reservation	44
Cong. Rec., vol. 31, pt. 5, p. 4781; 55th Cong., 2d sess	45
Therefore, rights of Indians were not violated by opening of Mille Lac tract to settlement, and there can be no recovery	45
No injustice done Indians under this construction	45
Result of census taken under act	45
Quantity of land ceded to Government, etc.	46
Result to Chippewas of agreements under act	46
Remarkable result of judgment of Court of Claims	46
Government derived no pecuniary benefit from cession and settlement of Mille Lac Reservation	46–47
(b) *The act of 1902.*	
Indians abandoned last vestige of claim to any part of Mille Lac tract by accepting conditions and benefits of act of May, 1902 (32 Stat., 268)	47–48

ARGUMENT—Continued. Page.

V. If Mille Lac Reservation be considered one of the reservations ceded by Indians under Nelson Act of 1889, their measure of damages is found in that statute. Section 6 excludes from sale under that act every tract on which there was a subsisting valid preemption or homestead entry. Such subsisting entries covered over 55,000 acres of Mille Lac tract; only remaining 5,000 acres could therefore be sold under Nelson Act.

Assuming that Mille Lac tract should be treated as a reservation under Nelson Act, judgment of Court of Claims overlooks fact that 55,000 acres had been filed upon and that land, under provision of sec. 6, can not be sold for benefit of Indians 49–50

12 Land Decision, 54 50

United States *v.* Schurz, 102 U. S., 378 50

Will be contended for Indians that Mille Lac tract was an Indian reservation on which, under the law, entries could not be made, etc 50

Sec. 2257, R. S., U. S 50

But such contention goes too far, for it nullifies the entire proviso 50

American Security & Trust Co. *v.* D. C., 224 U. S., 491 51

United States *v.* Hartwell, 6 Wall., 396 51

Congress by this proviso recognized and preserved all subsisting entries, etc 51

These entries were known both to Congress and to the Indians 51

Same conclusion reached by another line of argument 51

Meaning of term allowance as here used 51

ARGUMENT—Continued. Page.

Under regulations and decisions in force in Department of Interior, all entries made in 1871 and 1872, and between 1877 and 1884, were valid subsisting entries at the time of passage of Nelson Act 52

Such was conclusion of Secretary Noble in the Walters case (12 L. D., 52) 52

Follows that rights of Indians were not infringed by perfection of entries subsisting in 1889; their damages are therefore confined to value of lands not then entered upon 53

If such construction be correct, case must be remanded with directions to ascertain value of portion of reservation which should have been sold under Nelson Act 53

VI. If the Nelson Act be inapplicable, the loss sustained by the Indians is merely the value of their right of occupancy, and not the fee-simple value of the land.

Under treaty of 1864, Mille Lac Band had mere right of occupancy during good behavior, etc 53

Was an uncertain tenure, subject to determination upon violation of the condition, and did not give Indians right to cut timber, except for domestic use, etc 54

Act Feb. 16, 1889 (25 Stat., 673; 3 Fed. Stat. Ann., 377) 54

United States *v.* Cook, 19 Wall., 591 .. 54

CONCLUSION 54

Judgment should be reversed, with directions to dismiss petition 54

APPENDICES 55–69

MISCELLANEOUS REPORTS, HOUSE DOCUMENTS, ETC.

	Page.
13 Stat., 541, 543, 560, 561	9
14 Stat., 273, 496	9
15 Stat., 202	9
16 Stat., 19, 339, 549	9
17 Stat., 169, 443	9
24 Stat., 44	10
H. R. Doc. 1388, 60th Cong., 1st sess., pp. 6–8–12–13	10–11–12
H. R. Doc. No. 287, 51st Cong., 1st sess	10
H. R., 48th Cong., vol. 199; Cong. Rec., vol. 15, pt. 6, p. 5800	14
H. R. Doc. 247, 51st Cong., 1st sess., pp. 9, 15, 27	20
Report of Commissioners, Senate Ex. Doc. 115, 49th Cong., 2d sess., p. 19	10
Reports of Secty. of Interior for 1862 and 1863, vol. 2, pp. 223 to 231	9
Heard's History of the Sioux War and Massacres, p. 239	9

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES, APPELLANT,
v.
THE MILLE LAC BAND OF CHIPPEWA INDIANS in the State of Minnesota. } No. 736.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This appeal is from a judgment of the Court of Claims rendered in favor of the Chippewa Indians of Minnesota for $827,580.72.

Jurisdiction was conferred on the Court of Claims by the act of February 15, 1909 (35 Stat., 619), which provides:

> That the Court of Claims be, and it is hereby, given jurisdiction to hear and determine a suit or suits to be brought by and on behalf of the Mille Lac Band of Chippewa Indians in the State of Minnesota against the United States on account of losses sustained by them or the Chippewas of Minnesota by reason of

> the opening of the Mille Lac Reservation in the State of Minnesota, embracing about sixty-one thousand acres of land, to public settlement under the general land laws of the United States; and from any final judgment or decree of the Court of Claims either party shall have the right to appeal to the Supreme Court of the United States.

While the judgment in this case is in favor of the Minnesota Chippewas, the petition was filed and the claim is asserted by only the Mille Lac Band of those Indians. In their petition it is alleged that by virtue of certain treaties between the United States and the Indians, the Mille Lac Band in 1864 became vested with the Indian title to a tract of land in Minnesota called the Mille Lac Reservation, and that thereafter the United States, in violation of the rights of the Indians, opened the tract to settlement as public land, whereby the Indians suffered great damage. The United States contended that the Indians had no such title, and that the land had been opened in strict conformity to law. The court took the view advanced by the Indians, and entered judgment in the amount stated. The decision was by a bare majority of the court, and separate dissenting opinions were filed by the Chief Justice (R., 41) and Judge Howry (R., 45).

THE QUESTIONS INVOLVED.

The case involves the title of the Indians to the Mille Lac Reservation, which was created by treaty of 1855.

By treaties of 1863 and 1864 the Indians ceded the reservation to the United States, and a new reservation was provided for their occupancy; these treaties contained a proviso (in article 12) that the Mille Lac Indians should not be compelled to remove—

> so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites.

The Mille Lac Reservation was opened to settlement as public land in 1871, and by 1889 nine-tenths of it had been entered; by joint resolutions of 1893 and 1898 these entries were confirmed and the entire tract was declared open to settlement.

The Nelson Act of 1889, and a subsequent act of 1902, offered gratuities to the Indians if they would remove to the other reservation, and the provisions of both acts were accepted by the Indians.

On these facts, more fully stated hereafter, the questions are—

Did the Indians by the proviso above quoted acquire any such title to the Mille Lac Reservation as prevented its settlement as public lands?

If so, did they surrender that title by voluntary removal, or by accepting the benefits of the Nelson Act or the act of 1902?

May the court go behind the confirmatory resolutions of 1893 and 1898?

If any right of the Indians was violated, what losses did they suffer?

The Mille Lac Reservation, as appears from the map attached to this brief, covered three fractional townships on the southern border of Mille Lac Lake, as well as several islands therein. This land was ceded to the United States by treaty of July 29, 1837 (7 Stat., 536), with the Chippewa Indians, who at that time occupied the northern part of Minnesota.

By treaty of September 30, 1854 (10 Stat., 1109), the Chippewa Indians of Lake Superior, and of Mississippi, partitioned the lands theretofore occupied in common, and the Lake Superiors ceded to the United States the lands bordering Lake Superior, except certain tracts which were reserved for occupancy by the several bands. These tracts subsequently became known as reservations and are shown on the map as the Grand Portage, Fond du Lac, Bois Forte, and Deer Creek Reservations.

By treaty of February 22, 1855 (10 Stat., 1165), the Mississippi, Pillager, and Lake Winnibigoshish Bands of Chippewa Indians, then occupying the land west of that ceded by the Lake Superior Chippewas, ceded their lands to the United States.

By article 2 of the treaty there was reserved and set apart a sufficient quantity of land for the permanent homes of the Indians. For the Mississippi Bands there were set apart six tracts which subsequently became known as the Mille Lac, Rabbit Lake, Gull Lake, Pokagomin Lake, Sandy Lake, and Rice Lake Reservations.

The Mille Lac tract, as before stated, was set apart out of lands ceded in 1837; the other five tracts were in the southern portion of the land ceded by the present treaty. All six tracts are shown in red on the map. For the Pillager and Lake Winnibigoshish Bands three other tracts were reserved, and these are in the center of the ceded land and shown on the map (in red) as adjoining Leech Lake, Cass Lake, and Winnibigoshish Lake.

It is to be noted that in the case of this treaty, the title to the reserved tracts was held in common, while in the treaty with the Lake Superiors each band had separate title to its reservation.

The other provisions of the treaty clearly show that Congress intended the Indians to settle upon the reserved tracts and turn to agricultural pursuits. For instance, in article 4, the Government promised to have plowed and prepared for cultivation suitable fields on each reservation. Large sums of money in cash, as well as in annuities for twenty years, were to be paid by the United States in full compensation for the ceded land.

Upon the execution of this treaty the bands signing it were settled upon nine small and widely separated tracts, with but one agent to care for them. The arrangement evidently was not satisfactory, and on March 11, 1863 (12 Stat., 1249), a new treaty was signed by the same bands. This treaty was superseded by another signed May 7, 1864 (13 Stat., 693), which, except in matters unimportant here, is in sub-

stance the same. The treaty of 1864 will be the one discussed in the brief.

By article 1 of this treaty the Mississippi Bands ceded absolutely to the United States the six tracts theretofore set apart for them.

In consideration of this cession the United States agreed to set apart for the future home of the Mississippi Chippewas one single reservation, which is described by boundaries and contains a much greater area than the six ceded tracts, and which adjoins and surrounds the three reservations of the Pillager and Lake Winnibigoshish Bands, and to this new reservation all the Indians were to remove.

By article 3 the United States extended the present annuities of the Indians for a period of 10 years, and made large cash payments to them.

By article 4 the United States agreed to make clearings on the new tract for each band and to build a house for each chief; for the Mille Lac Band 70 acres were to be cleared.

By article 5 the United States was to furnish the Indians oxen and agricultural implements and to provide carpenters, farm laborers, and a physician.

By article 6 the United States was to build a sawmill and to contribute $1,000 annually towards its support; to build a road to the new agency, and to expend $25,000 for agency buildings on the new reservation for the common use of the parties to the treaty and of the Red Lake and Pembina Bands.

By article 12 it was provided that it should not be obligatory upon the Indians to remove from their

present reservations until the United States had first complied with the provisions of articles 4 and 6, at which time the United States was to furnish them with transportation and subsistence at their new homes and subsistence for six months thereafter. This article concluded with the following proviso (and upon this the present claim of the Indians is based):

> That, owing to the heretofore good conduct of the Mille Lac Indians they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites. (13 Stat., 695.)

By article 14 it was distinctly understood that the clearing and breaking of land for the Chippewas of the Mississippi provided in the fourth article of the treaty should be in lieu of all former obligations for breaking lands for these bands, and that the treaty was in lieu of the aforesaid treaty of 1863.

In the Senate, article 12 was, at the instance of the Indians, amended to provide that the members of the tribe residing on the Sandy Lake Reservation should not be removed until the President should so direct. (Ib., 696.)

It is conceded in this case that the United States complied with articles 4 and 6 of this treaty.

On March 19, 1867, there was concluded another treaty between the United States and the Chippewa Indians of the Mississippi (16 Stat., 719), the preamble of which recited that a part of the reservation created by the treaty of 1864 was not adapted for agriculture purposes; therefore the Indians ceded to

the United States all of said reservation, except the tract therein described by boundaries, and which is shown (in yellow) on the map.

In order to provide a suitable farming region for the Indians, by article 2 there was set apart an additional tract of land to be located in a form as nearly square as possible, which was to include White Earth Lake and Rice Lake and to contain 36 townships of land and to one or the other of these reservations the Indians were to remove. This reservation was subsequently called the White Earth Reservation, and is so marked and shown in yellow on the map.

In further consideration of the cession, the United States agreed to appropriate $46,500 for schools and the erection of houses for the Indians who should move to the new reservation, and for the purchase of stock, provisions, agricultural implements, medicine, clothing, etc.

THE GOOD CONDUCT OF THE INDIANS.

The claim of the Indians is that the proviso of article 12 of the treaty of 1864 gave them the absolute Indian title to the Mille Lac Reservation.

They lay great stress upon the "heretofore good conduct" which they assert was the consideration for the grant to them. The Court of Claims in Finding 3, after calling attention to an uprising of the Sioux in 1862, and the fact that certain of the Chippewa Bands desired to join in the outbreak, finds that the Mille Lac Band went to the assistance of the United States forts, and by demonstrations of loyalty to the Government prevented the other members of the

Chippewa Bands from joining in the uprising, and this the court said was the good conduct mentioned in the treaty.

While the question is probably not of any great importance, the Government contends that the real reason which prevented the Chippewas joining the uprising was the hereditary enmity between them and the Sioux and the promises of the Commissioner of Indian Affairs to have their wrongs inquired into. This contention is established by the reports of the Secretary of the Interior for 1862 and 1863, volume 2, pages 223 to 231, and by Heard's History of the Sioux War and Massacres, page 239, which documents are open to this court for consideration.

Judge Howry, in his dissenting opinion (R., p. 48), states the substance of the Secretary's report.

In determining the true construction of the proviso relied upon, considerable weight will be given to the subsequent acts of the Government officers and of the Indians.

REMOVAL FROM MILLE LAC.

Appropriations were made annually for removal and subsistence of the Mississippi Chippewas from 1865 to 1873. (13 Stat., 541, 543, 560, 561; 14 Stat., 273, 496; 15 Stat., 202; 16 Stat., 19, 339, 549; 17 Stat., 169, 443).

Before 1872, twenty-five members of the Mille Lac Band had removed to the White Earth Reservation, and by May 10, 1882, about 500 Indians remained

on Mille Lac (H. R. Doc. 1388, 60th Cong., 1st sess., p. 8; Rec., 53, Appendix C).

According to the report of the commissioners appointed under the act of May 18, 1886 (24 Stat., 44), to negotiate with the Chippewa Indians for the modification of existing treaties and changes of reservations, there were on December 1, 1886, not more than 200 Indians remaining on the Mille Lac tract; few of them were actually living on that reservation, but the majority were scattered throughout the country south of it; and, with the exception of three or four shanties, there was not a house on the reservation; these remnants of the bands were living, summer and winter, in birch-bark wigwams, and the children and women were in a state of barbarism. (R., 49, 53; Report of Commissioners, Senate Executive Doc. 115, 49th Cong., 2d sess., p. 19.)

A census taken in the summer of 1889 showed but 895 Mille Lac Indians, and while that census does not show where they were located, evidently most of them were on the White Earth Reservation. (H. R. Doc. No. 247, 51st Cong., 1st sess.; R., 50.)

DEPARTMENTAL DECISIONS AND ACTS OF CONGRESS.

Between 1870 and 1884 nine-tenths of the Mille Lac Reservation was settled upon or preempted by the whites.

The public surveys of this reservation were completed in 1870. (H. R. Rep. 1388, p. 6.) Between May and August, 1871, preemption entries aggregating 11,026.42 acres were located on the former Mille

Lac Reservation, and during the same months 117 declaratory statements were filed covering several thousand additional acres. (Finding VIII, R. 13.)

On August 22, 1871, the Commissioner of Indian Affairs, learning of this fact, wrote the Secretary of the Interior that in his opinion it would be improper to permit white settlers to go upon the reservation while the Indians remained. Thereupon on September 1, 1871, the General Land Office instructed the local land officers at Taylors Falls, Minn., in which district the reservation lay, to give public notice that settlements on the reservation were illegal, and would not be recognized. (H. R. Rep. 1388, 60th Cong., 1st sess., pp. 6–12.)

By letter of January 24, 1872, of the General Land Office, all such entries on land in said reservation were declared cancelled, and the local land officers directed to make proper entry on their records, and to notify the proper parties thereof. (Ib., p. 12, Rec., p. 14.)

Subsequently, one Frank W. Folsom appealed to the Secretary of the Interior from the decision rejecting his application. Secretary Chandler on March 1, 1877, held that the proviso to Article XII of the treaty of 1864 did not exclude the lands of Mille Lac Reservation from sale and disposal by the United States under the General Land Office, but because there was no appropriation available for the immediate removal of the Mille Lac Indians, and solely as a matter of expediency, directed that the execution

of his decision be suspended and that no filings of entries upon said lands be allowed until the close of the next session of Congress. (H. R. Rep. 1388, p. 13, and Rec., p. 14.) The Secretary's decision is Appendix A to this brief.

Instructions in accordance with this decision were issued to the local land officers at Taylors Falls on March 15, 1877. (H. R. Rep. 1388, p. 13.)

The session of Congress in question adjourned about June 20, 1878. Secretary Schurz, who had succeeded Mr. Chandler, on June 21, directed, in a letter to the Land Office, that all claims on any of said lands subject to entry should remain in *statu quo*, and ordered the local land officers to allow no entries upon any of said land until the result of the action of Congress in relation to the right of the Indians to occupy the reservation was determined. Copies of this letter were sent to the district land officers on June 28, 1878. (Ib., 13.)

The last session of the Forty-ninth Congress adjourned in March, 1879, without passing pending bills relating to these Indians. In the meantime 285 soldiers' homestead entries, embracing over 23,000 acres in area, had accumulated at the local land office. The officers there assumed that the instructions for the suspension of these entries terminated with the expiration of Congress, and on March 12, 1879, allowed the applications, some of which had been pending nearly four years. (H. R. Rep. 1388, pp. 13, 14.)

On May 21, 1879, Secretary Schurz (whose letter is filed herewith as Appendix B) directed that these entries be cancelled because made in violation of departmental instructions.

May 10, 1882, Secretary Teller, who had succeeded Mr. Schurz, wrote to the Commissioner of Indian Affairs, adopting the views of Mr. Chandler, and holding that the so-called Mille Lac Reservation was public land open to homestead and preemption claims. Copy of his opinion i attached hereto as Appendix "C." (R., 14.)

On August 7, 1882, the Commissioner of the Land Office wrote the Secretary of the Interior asking for specific instructions upon the cancelled entries, and on the same day Secretary Teller replied:

> I want all the entries heretofore canceled in the so-called Mille Lac Reservation reinstated for an examination as to their *bona fide* character, for if made in good faith the canceling of such entries was without authority of law, and in derogation of the rights of the parties making such entries. It is necessary, to save the rights of such persons and prevent a conflict with others, to reinstate such entries, and, therefore, this ought to be done at once. (H. R. 1388, p. 15.)

In the last-mentioned report is an abstract of another letter of Secretary Teller, dated February 13, 1883, to the Commissioner of the Land Office, stating that he had previously held that there was no reservation, and that the Mille Lac land was public land (ib., p. 15).

The canceled entries were reinstated by order of the Land Office, and in accordance with the principle of the ruling on which that order was based the local land officers thereafter permitted the filing of new claims, so that by March 31, 1884, out of 61,028.14 acres contained in the reservation, 55,976.42 acres had been filed upon under the general land laws of the United States, of which 7,792.16 acres had gone to patent, leaving only 5,051.72 acres open at that time to settlement. (Rec., p. 14; Appendix C; 12 Land Dec. 54, Walters et al.)

At this juncture the following paragraph was included in the Indian appropriation act of July 4, 1884 (23 Stat., 78):

> That the lands acquired from the White Oak Point and Mille Lac Bands of Chippewa Indians on the White Earth Reservation, in Minnesota, by the treaty proclaimed March twentieth, eighteen hundred and sixty-five, shall not be patented or disposed of in any manner until further legislation by Congress.

The words "on the White Earth Reservation" are repugnant, and the act should be read with them eliminated. (5 Land Dec., 541.) This paragraph originally contained an appropriation for the removal of the White Point and Mille Lac Indians "on the White Earth Reservation," and these words were inadvertently left in the paragraph as passed. (H. R., 48th Cong., vol. 199; Cong. Rec., vol. 15, pt. 6, p. 5800.)

As said by Judge Howry, the appropriation was no doubt omitted for the reason that the great majority of the Indians had already removed to the White Earth Reservation. (R., 50.)

On August 21, 1886, the State of Minnesota having appealed from a decision of the Commissioner of the Land Office rejecting the claim of the State under the swamp land grant to certain lands in the Mille Lac Reservation, Secretary Lamar affirmed the decision on the ground that the department had no authority to dispose of the lands because of the prohibition of the act of July 4, 1884. (5 Land Dec., 102.)

The Indian appropriation act of May 15, 1886 (24 Stats., 44), authorized the Secretary of the Interior to negotiate with the several tribes and bands of Chippewa Indians in Minnesota relative to such modifications of their treaties and such change of their reservations as might be deemed desirable, and as to what sum should be an equitable liquidation of all claims which any of said tribes then had against the Government.

At this time all but 200 of the Mille Lac Indians had removed to the White Earth Reservation. Most of these 200 were scattered throughout the country south of Mille Lac tract, principally on Snake River. Messrs. Wright, Whipple, and Larrabee, commissioners appointed under the act, met in council with these for the purpose of securing their removal to the White Earth Reservation, but the negotiations were unsuccessful.

During these negotiations the commissioners read to the Indians a communication from Secretary Lamar, of October 23, 1886, in which he said the President had heard with great surprise and disappointment of their refusal to consent to remove to the White Earth Reservation, where they would be beyond the reach of avaricious white men and have good homes with peace and plenty; and if they persisted in remaining on their old reservation they would do so at their own risk; that "it is the desire of the President that the commissioners explain fully to these Indians the condition of affairs; that they have ceded the lands of the Mille Lac Reservation to the United States, and are permitted to remain there only so long as they shall not in any way interfere with or molest the persons or property of the whites. The President desired that the commissioners shall make another effort to induce these Indians to remove to White Earth, where all the Chippewas will be united in one happy and prosperous family." (Appendix D.)

The act of January 14, 1889, entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota" (25 Stat., 642), and commonly known as the Nelson Act, is, next to the treaty of 1864, of decisive importance in this case.

By section 1 of this act the appointment of three commissioners was authorized "to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and

relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations," and on those two reservations it provided for the cession of all surplus lands after the necessary allotments in severalty had been made to all of the Chippewa Indians in Minnesota. Where allotments had been made in severalty to any Indian upon any of said reservations he should not be disturbed without his consent; that for the purposes of the cession and making allotments and payments the commissioners should make an accurate census of each tribe or band before securing the cessions and relinquishments of their reservations; that the acceptance and approval of the cessions and relinquishments by the President should be deemed full and ample proof of the assent of the Indians, and should operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever for the purposes and upon the terms in said act provided.

By section 3 it was provided that as soon as a census had been taken and the cession and relinquishment approved and ratified, all of the said Chippewas in the State of Minnesota, except those on the Red Lake Reservation, under the direction of said commissioners, should be removed to and take up their residence on the White Earth Reservation, and as soon as practicable, under the direction of said commissioners, should be allotted lands

in severalty to the Red Lake Indians on the Red Lake Reservation, and to all other of said Indians on the White Earth Reservation; and all allotments theretofore made on the White Earth Reservation were ratified and confirmed, to be held in accordance with the conditions prescribed for allotments under this act.

This section contained a proviso that any of the Indians residing on any of said reservations might in his discretion take his allotment on the reservation where he lived.

Section 4 provided that upon the cession and relinquishment of the Indian title, the ceded lands should be surveyed by the Commissioner of the General Land Office as public lands and divided up into 40-acre tracts and a thorough and careful examination made and notes taken showing the quantity and quality of the pine growing thereon and classified as "pine lands"; and a list giving the description of each 40-acre tract should be made, and opposite each description the cash value of the same, such valuation to be at a rate of not less than $3 per 1,000 feet board measure. If the appraisals should be rejected the Secretary of the Interior should substitute new appraisals, etc., and the same or original list as approved and modified should be filed with the Commissioner of the General Land Office.

Section 5 provided for the sale of the pine lands by advertisement, auction, and private sale.

Section 6 provided for the sale of agricultural lands as public lands under the homestead laws, and that each settler should pay in accordance with the provisions of said laws for the allotment so taken by him the sum of $1.25 for each and every acre in five equal annual payments, and should be entitled to a patent at the expiration of five years from the date of entry, and after the full payment of said $1.25 per acre therefor, and proof of occupancy for said period of five years, etc., with a proviso:

> That nothing in this act shall be held to authorize the sale or other disposal under its provision of any tract upon which there is a subsisting valid preemption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the date of its allowance, and if found regular and valid, patents shall issue thereon.

Section 7 provided that of the moneys accruing from the sales of these lands, after deducting the expenses of census, cessions and relinquishments, removals and allotments, surveys and appraisals, the balance should be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which should draw interest at the rate of five per cent per annum, payable annually for a period of 50 years after the allotments provided for in this act have been made. The section then provides for the distribution of the funds.

Sections 4 and 5 of the act were amended by the act of June 27, 1902 (32 Stat., 400), so as to permit the sale of the pine timber and the pine lands separately, and authorized the Forester of the Agricultural Department to set apart a forest reserve and supervise the cutting of timber thereon, and fixed the minimum price of Norway and white pine at four and five dollars per thousand feet on the stump, respectively.

In pursuance of the act of January 14, 1889, the President of the United States on February 26, 1889, appointed three commissioners, who, after having qualified as required by the act, took a census of the Chippewa Indians of Minnesota, and the Mille Lacs were registered to the number of 895, the total number of Chippewa Indians in Minnesota aggregating 8,304, and the quantity of land in all of the Chippewa reservations in said State aggregating 4,747,931 acres, of which the Mississippi Chippewas were interested in but 796,672 acres (H. R. Doc. 247, 51st Cong., 1st sess., pp. 9, 15, 27), and thereafter, on different dates, by different agreements with the different bands, secured the cession and relinquishment to the United States of the Grand Portage Reservation, Fond du Lac Reservation, Boise or Wood Forte Reservation, and Deer Creek Reservation, and the surplus lands of the White Earth and Red Lake Reservations not required for allotment in severalty to said Indians, parties to said treaties, and the right of occupancy of the former Mille Lac Reser-

vation under article 12 of the treaty of May 7, 1864, was relinquished by the Mille Lac Band. Each separate agreement made with each of the bands of the Chippewas in Minnesota was separately approved, in accordance with the act of January 14, 1889, by President Benjamin Harrison.

On March 4, 1890, the report of the commissioners and the agreements with the different bands were transmitted by President Harrison to Congress and were printed as House of Representatives Executive Document No. 247, Fifty-first Congress, first session.

On October 5, 1889, the Mille Lac Band, under the provisions of the act of January 14, 1889, *supra*, ceded, relinquished, and conveyed to the United States all of their right, title, and interest in and to four townships of the White Earth Reservation, reserved by article 2 of the treaty of April 18, 1867, *supra*, and the lands reserved by article 1 of said treaty not embraced in the White Earth Reservation; they also ceded and relinquished all their right, title, and interest in and to the Red Lake Reservation, and *relinquished* their right of occupancy of the Mille Lac Reservation, reserved by article 12 of the treaty of May 7, 1864, *supra*. (Rec., pp. 15, 16.)

April 10, 1889 (8 L. D., 409), Secretary Noble, apparently overlooking this act of January 14, 1889, treated the act of July 4, 1884, as still in force and held that it prohibited action on an entry made prior to its passage.

January 8, 1890 (10 L. D., 3), this decision was recalled, but the Secretary held that he was still

without power to dispose of the entry, because he thought the cession by the Indians of their remaining interest in the lands was a condition precedent to action by him under the proviso of section 6 on entries theretofore made on said land.

A year later, January 9, 1891, in the case of Amanda J. Walters (12 L. D., 52), the negotiations with the Indians under the act of January 14, 1889, having in the meantime been concluded, Secretary Noble held that the act of 1889 was the further legislation required by the act of 1884, and that therefore all pending entries, if found regular and valid in other particulars, should proceed to patent, and, because of the long delay, he directed that they all be made special. In his opinion the Secretary called attention to the facts already stated, that the pending claims covered almost the entire Mille Lac Reservation; that these entries were valid under the decisions of Secretary Chandler and Secretary Teller, and that the right of the department under the act of 1889 to allow the entries to proceed to patent seemed clear aside from any question of relinquishment of claims by the Mille Lac Indians. He continued:

> Nevertheless it is also true, and adds greatly to the force of the argument, that the Mille Lac Indians joined in the agreement under the act of 1889, whereby the Indian lands save in the reservations therein mentioned were ceded to the United States. By this any possible interest the Mille Lacs may have had was transferred to the United States. I

> think the language of the statute of 1889 that the lands upon which the Mille Lacs have enjoyed the favor of residence so long as they should not interfere with the whites is equivalent to a declaration that this favor or license did not amount in effect to a "reservation" of these lands upon which the Mille Lacs could take allotments, because it was upon these lands *alone* that subsisting valid preemption or homestead entries existed or were claimed under the regulations and decisions in force at the dates that they were severally allowed and which this statute declares shall now proceed to patent.
>
> It is to be remembered also that another reservation was thereby made (the White Earth), to which the Mille Lacs could remove. There was thus provided, on the one hand, legislation for the perfection of the entries of the white men, and on the other, a place of abode for the Indians.

He then held that the right given by section 3 of the act of 1889 to any Indian to make his allotment on the reservation on which he resided did not, for the reason stated, apply to the Mille Lac Reservation. He said:

> Suffice it to say that the land in question was not a reservation within the meaning of the act. It was ceded in 1863; it had been declared open to entry by successive decisions from the department under the regulations of the Land Office, and was the very land referred to and intended to be covered by the proviso to section 6.

84919—13——3

On January 21, 1891, Secretary Noble wrote to the Commissioner of the Land Office reaffirming his last decision, and holding that the Mille Lac lands should be disposed of as other public lands under the general laws, and consequently would not be surveyed under the act of 1889. (See Appendix E.)

On September 3, 1891, in the case of *Northern Pacific Railroad Company* v. *Walters* (13 L. D., 230), Secretary Noble held that the railroad company was not authorized prior to the act of 1889 to make lieu selections on the Mille Lac Reservation. He also expressed the view, apparently unnecessarily, that the Mille Lac lands not disposed of were to be sold as pine or agricultural lands under the act of January 14, 1889.

In 1892 the Commissioner of the General Land Office wrote to the Secretary asking which of his decisions should govern, and on April 22, 1892 (14 L. D., 497), the Secretary curtly replied that the decision in *Northern Pacific Railroad Co.* v. *Walters* was the later expression of the department, and was rendered in a case where the status of the Mille Lac lands was the specific question, and it was therefore to be followed.

Evidently a large number of entries on the lands within the Mille Lac Reservation had been made between the Secretary's first ruling and his reversal thereof. The matter was taken to Congress, with the result that the Secretary's first ruling was adopted

as correct, by the act of December 19, 1893 (28 Stat., 576), which provides:

> That all bona fide preemption or homestead filings or entries allowed for lands within the Mille Lac Indian Reservation, in the State of Minnesota, between the ninth day of January, eighteen hundred and ninety-one, the date of the decision of the Secretary of the Interior holding that the lands within said reservation were subject to disposal as other public lands under the general land laws, and the date of the receipt at the district land office at Taylors Falls, in that State, of the letter from the Commissioner of the General Land Office communicating to them the decision of the Secretary of the Interior of April twenty-second, eighteen hundred and ninety-two, in which it was definitely determined that said lands were not so subject to disposal, but could only be disposed of according to the provisions of the special act of January fourteenth, eighteen hundred and eighty-nine (25 Stat., 642), be, and the same are hereby, confirmed where regular in other respects, and patent shall issue to the claimants for the lands embraced therein, as in other cases, on a satisfactory showing of a bona fide compliance on their part with the requirements of the laws under which said filings and entries were respectively allowed.

On May 27, 1898 (30 Stat., 745), Congress passed a joint resolution declaring:

> That all public lands formerly within the Mille Lac Reservation, in the State of Minnesota, be, and the same are hereby, declared

to be subject to entry by any bona fide qualified settler under the public land laws of the United States; and all preemption filings heretofore made prior to the repeal of the preemption law by the act of March third, eighteen hundred and ninety-one, and all homestead entries or applications to make entry under the homestead laws, shall be received and treated in all respects as if made upon any of the public lands of the United States subject to preemption or homestead entry.

In the Indian appropriation act of May 27, 1902 (32 Stat., 268), there was inserted the following provision:

> For payment to the Indians occupying the Mille Lac Reservation, in the State of Minnesota, the sum of forty thousand dollars, or so much thereof as may be necessary, to pay said Indians for improvements made by them, or any of them, upon lands occupied by them on said Mille Lac Reservation, said payment to be made upon investigation, examination, and appraisement by the Secretary of the Interior, upon condition of said Indians removing from said Mille Lac Reservation: *Provided*, That any Indian who has leased or purchased any Government subdivision of land within said Mille Lac Reservation from or through a person having title to said land from the Government of the United States shall not be required to move from said reservation, but shall be entitled to the benefits of said appropriation to all intents and purposes as though they had removed from said reservation: *And provided*

further, That this appropriation shall be paid only after said Indians shall, by proper council proceedings, have accepted the provisions hereof and declared the manner in which they wish the money disbursed; and said Indians upon removing from said Mille Lac Reservation shall be permitted to take up their residence and obtain allotments in severalty either on the White Earth Reservation or on any of the ceded Indian reservations in the State of Minnesota on which allotments are made to Indians.

In pursuance of the provisions of the above act an agreement was entered into on August 30, 1902, between the United States and the Mille Lac Indians still residing on the former Mille Lac Reservation, by which they agreed to remove to White Earth Reservation on the payment of $40,000 appropriated by the act of May 27, 1902, for their improvements, and the agreement was signed by 74 adults. These improvements at the time of their appraisement were practically of no value, the object in view being the possible removal of the Indians to the White Earth Reservation. The clause contained in the agreement (Appendix F) that nothing therein should be construed to deprive said Indians of any benefits to which they might be entitled under existing treaties or agreements not inconsistent with the agreement then entered into or the act of May 27, 1902, is the identical provision which has been inserted in every agreement made with the Indians since 1896. (Rec., pp. 12, 17, 35, 36, 43, 54.)

ASSIGNMENT OF ERRORS.

The Court of Claims erred:

1. In holding that the act of 1909 did anything more than furnish a forum for the adjudication of the claim.

2. In holding that the joint resolutions of 1893 and 1898 were not an exercise by Congress of its plenary power over the lands.

3. In holding that any right of the Indians was violated by the opening of the Mille Lac Reservation to public settlement under the general land laws of the United States.

4. In holding that the Indians sustained any losses by reason of such opening of said reservation to public settlement.

5. In holding that the Mille Lac Band of Indians had such title to said reservation as excluded the same from settlement as public land.

6. In not holding that the Mille Lac Band had abandoned all claim to said reservation by voluntary removal therefrom prior to 1889.

7. In not holding that the acceptance by the Mille Lac Band of the benefits of the Nelson Act of 1889 was a final settlement of their claims to the Mille Lac Reservation.

8. In not holding that the acceptance of the provision of the act of 1902 was a settlement of the Indians claims.

9. In disregarding section 6 of the Nelson Act, and in holding that the Indians were entitled to the value of the entire Mille Lac Reservation, including the nine-tenths thereof upon which valid entries were subsisting at the passage of the act.

10. In holding that the Indians were entitled to the sale value of the land.

ARGUMENT.

I.

The jurisdictional act creates no liability, but simply furnishes a forum for the adjudication of the claim.

This is the rule laid down by this court. (*Stewart* v. *U. S.*, 206 U. S., 185, 194; *The Sac and Fox Indians*, 220 U. S., 481, 489.)

The Court of Claims, therefore, was in error in holding in effect that the act of 1909, referring the claim to that court, is a legislative decision that something is due the Indians.

It was not intended by the jurisdictional act to strip the Government of all legal and equitable defenses and submit to the court the single question of the amount of losses. If the only question open were the extent of damages, that is a simple question of fact; while this court is primarily concerned with the law; the right of appeal, therefore, would be useless. It follows that the question of liability was left open for decision by the courts.

(*a*) Congress has plenary power and control over the Indian tribes. (*Cherokee Nation* v. *Hitchcock*, 187 U. S., 294; *Lone Wolf* v. *Hitchcock*, 187 U. S., 565.)

Congress did not intend by the act of 1909 to authorize the courts to inquire into the justice and fairness of its dealings with the Indians, and to throw open the propriety of the legislation with reference

to the Mille Lac land. The question presented to the court is whether, taking all the treaties and statutes together, any right of the Indians was violated by the opening of the Mille Lac Reservation to settlement. And, of course, in deciding this question, if there be a conflict between an earlier treaty and a later statute, the provisions of the statute will apply. And there can be no imputation of unfairness to Congress; nor can the court go behind a treaty or statute on the ground that it was obtained by duress or fraud.

These principles are settled by this court in the cases of *United States* v. *Old Settlers*, 148 U. S., 427, 466; *United States* v. *Choctaw and Chickasaw Nations*, 179 U. S., 494, 531–535.

These cases are particularly pertinent because they, like the present, were referred by special acts to the Court of Claims for adjudication. In *United States* v. *Choctaw Nation* this court said at page 535:

> It is thus clear that the Court of Claims is without authority to determine the rights of parties upon the ground of mere justice or fairness, much less, under the guise of interpretation, to depart from the plain import of the words of the treaty. Its duty was to ascertain the intent of the parties according to the established rules for the interpretation of treaties.
>
> * * * * *
>
> If the treaty of 1866, according to its tenor and obvious import, did injustice to the Choctaws and Chickasaws, the remedy is

with the political department of the Government (p. 535).

In the present case the land involved was first thrown open to settlement in 1870, and by 1884 claims were filed upon nine-tenths of it. We show hereafter that the land was public land and that its settlement was in strict accordance with law, but passing for future discussion that question as well as questions arising under the Nelson Act of 1889, by subsequent legislation Congress clearly exercised its plenary power over this land, ratified all prior entries and opened the unoccupied land to settlement.

The joint resolution of December 19, 1893 (28 Stat., 576), confirmed all entries made on the Mille Lac land in 1891 and 1892, and authorized patents to issue.

The joint resolution of May 27, 1898 (30 Stat., 745), declares that all lands within the Mille Lac Reservation were subject to entry, and confirmed all entries theretofore made.

This legislation effectually disposed of all doubts upon the matter, and opened these lands to settlement. Congress acted within its plenary power, and there was therefore no injury to the Indians.

(*b*) If the legislation just mentioned be not conclusive, the question then before the court is whether the United States by opening the Mille Lac tract to settlement as public land infringed any legal rights of the Indians acquired by them under the treaties of 1863 and 1864, and which were not relinquished, either voluntarily, or by accepting the terms of the Nelson Act and the act of 1902.

II.

The Mille Lac Reservation was ceded to the United States by the treaties of 1863 and 1864, and became public land open to settlement. The Mille Lac Band acquired no title thereto, but was permitted to remain thereon temporarily.

If this be true, the right of the Indians was not violated by the opening of the land to settlement, and they have suffered no damages.

The claim of the Indians is based upon the proviso of article 12 of the treaty, and the correctness of the foregoing proposition depends upon the proper construction of that provision.

In determining this question the court will consider the conditions leading up to the treaty, the objects sought to be accomplished, as well as the language used, and the practical construction given to the treaty by the parties.

By the treaty of 1855 there had been set apart for the Indians nine widely separated tracts or reservations under the supervision of a single agent; and the settlers were gradually approaching from the South.

Need for the removal of the Indians is shown by a letter, dated September 14, 1862, from Mr. Dole, Commissioner of Indian Affairs (who signed both the treaties of 1863 and 1864), to Governor Ramsey, of Minnesota, in which it is said:

> In my council with the Mille Lac Indians I promised them that their due proportion of the goods and moneys due them this fall

should be paid to them at their reservation, without subjecting them to a payment of any portion of the damages for depredations committed by the Chippewas within the last four weeks. I trust you will not find it necessary to make any change in this arrangement.

If it could be arranged to remove these Indians further north toward Red Lake and Red River, I have no doubt that both the Indians and the white man would be benefited, and that it would be approved by the Government; and you are authorized to negotiate with them to this effect, subject to the usual confirmation by the Senate. (Report of Secretary of Interior, 1862, pp. 227, 228.)

There were thus two objects of the treaty. One, for the benefit of the Indians, to collect them all upon one compact reservation where they would be within easy supervision, their children would have access to schools, and they might engage in agricultural pursuits; and the other, to open the desired lands to settlement by the whites.

These objects are apparent from the provisions of the treaty.

The six reservations occupied by the Mississippi Bands were absolutely ceded to the United States (article 1), in compensation for which a new and larger reservation was created in the immediate neighborhood of the three reservations occupied by the Pillager and Lake Winnibigoshish Bands (article 2); in further consideration large cash payments were made to the Indians, and their annuities under the treaty of 1855 were extended for a period of ten

years (article 3); the United States also agreed to prepare lands on the new reservation for cultivation and to build houses for the chiefs; 70 acres were to be cleared especially for the Mille Lac Band (article 4); large sums were to be expended for farming implements and animals, and farmers were to be employed to teach the Indians (article 5); a sawmill was to be built and maintained, roads established, and new agency buildings erected (article 6). By article 14 it is expressly stipulated that the clearing and breaking of land as provided for in the fourth article of the treaty shall be in lieu of all former engagements of the United States for breaking land for these bands. Appropriations were made for the removal of the Indians from the ceded to their new reservation and subsistence thereon, in accordance with the provisions of the treaty, from 1865 to 1873.

The absolute cession of the lands to the United States and the unmistakable intention to remove the Mille Lac Band to the new reservation are not destroyed by the proviso. The language used is not susceptible of that construction.

In the first place, if it had been intended to give the land to the Indians, a cession would not have been made to the United States, but there would have been a reservation or exception to the Mille Lac band alone. The framers of the treaty knew how to do this, for by article 1 they did except one section at Mille Lac, which was granted in fee simple to Chief Shaw-vosh-kung. An expressed exception excludes all others.

Again, the language of the proviso is not appropriate to convey the Indian title or establish or continue a reservation. The Indian title is not conditioned on good conduct.

The language used has not in its ordinary acceptation the meaning contended for by the Indians. The privilege is merely *not to be compelled to remove* from a certain large tract of land. This is not a right to exclusively occupy the entire tract and to prevent settlement by the whites. The Indians did not in fact, as appears in the case, need or use the entire tract. It is a misuse of language to say that such a privilege confers the right to exclude all others. On the contrary, the language not to interfere with nor molest the whites recognizes and implies the very right of the latter to come and settle upon the lands, for as yet no whites were there.

On the claimants' construction the United States is placed in the attitude of being both grantor and grantee in the same instrument.

The construction contended for would defeat the very objects of the treaty, for it would, as said by Judge Howry (R., 51) destroy the manifest intention of the Government to provide homesteads for white settlers and the manifest intention of the Mille Lac Band to adjust themselves to that expectation.

The treaty was in fact a purchase from the Indians of all their title to the six ceded reservations, and ample consideration was paid therefor, both in land and in money. The land so purchased therefore became public land open to settlement.

The reservation was so regarded by the officers of the Interior Department, in their practical administration of the land laws.

The land was surveyed as public land in 1870 and settlements began in 1871, and within four months thereafter entries were filed covering perhaps one-fourth of the land (R., 13, 14, Finding VIII). Thereupon, the Commissioner of Indian Affairs persuaded the then Secretary of the Interior that it would be unwise to permit white settlers on the tract while any of the Indians remained, and the Secretary suspended further entries upon the reservation.

In 1877, on the appeal of Folsom, Secretary Chandler delivered an elaborate opinion construing the statute in accordance with the Government's contention.

He said:

> All of the conditions of said treaties having been complied with by the United States, the title to said lands now rests absolutely in the United States.
>
> * * * * *
>
> Under this proviso it is true that, so long as said Indians do not interfere with the persons or property of the whites, they can not be *compelled* to remove; but it by no means gives them an exclusive right to the lands, nor does it, in my judgment, exclude said lands from sale and disposal by the United States.
>
> It was anticipated, evidently, that these lands would be settled upon by white persons; that they would take with them their property

> and effects, and it was provided that so long as the Indians did not interfere with such white persons or their property, they might remain, not because they had any right to the lands but simply as a matter of favor.
>
> In this view of the case, and I am satisfied that this is the proper construction of said proviso, said lands are now, and were at the time Folsom offered to file his declaratory statement, subject to preemption filing and entry. (Appendix A.)

There had been appropriations for moving the Indians, but they had not all left Mille Lac. For this reason, therefore, Secretary Chandler directed that further entries be suspended until appropriation be made or until the Indians should voluntarily remove. This direction was continued by Secretary Schurz, and certain entries were canceled by him because made in violation of his order. Thereafter, in 1882, Secretary Teller, upon a full consideration of the entire question, adopted Mr. Chandler's construction of the statute and reinstated all entries. The Secretary held that there was no reservation; that the Mille Lac tract was public land, and the cancelling of entries made in good faith was without authority of law and in derogation of the rights of the entrymen.

And this decision was in force in 1884, when Congress suspended all entries until further legislation.

Attention should be called to several erroneous statements in the majority opinion with reference to the decisions of Secretaries Schurz and Teller.

It is said (R., 14, 20) that Secretary Schurz held all the land entries invalid and reversed the decisions of his predecessor.

The fact is that Secretary Chandler, while holding the land to be public and open to settlement, ordered that entries be suspended merely as a matter of expediency; Schurz adopted and repeated this order; and his opinion referred to on page 14 merely held invalid those entries which he thought had been permitted in violation of his instructions. (Appendix B.)

Again, it is said (R., 14) that Secretary Teller suspended the question of the validity of the land entries until Congress should legislate concerning the rights of the Indians. On the contrary, Secretary Teller expressly held that the reservation was public land open to homestead and preemption claims. (Op. of May 10, 1882, Appendix C.) In this opinion he also said that it was not claimed that it was necessary to exclude white settlers from the reservation in order to keep in good faith the treaty with the Indians.

These decisions of Secretaries Chandler and Teller were followed by Secretary Lamar in 1886, who held that the land was public and open to settlement.

This practical construction given to the treaty by the executive department charged with its enforcement (and which will be given great weight by the courts, *Brown* v. *U. S.*, 113 U. S., 568) was evidently recognized by the great majority of the Indians, who voluntarily abandoned the reservation and removed to White Earth, where they accepted allotments.

Upon this full consideration, therefore, of the language of the treaty; the considerations under which it was made; and the subsequent action of the Government officials, as well as of the Indians, it is submitted that the Indians had no title to the Mille Lac tract, but that it was public land. It necessarily follows that the rights of the Indians were not infringed in opening this land to settlement.

III.

The Mille Lac Band abandoned any claim to the reservation by voluntary removal therefrom.

As has already been shown, the majority of the Mille Lac Band prior to 1889 had voluntarily removed to the White Earth Reservation. Thereby the claim of the whole band to the reservation was abandoned.

The United States deals with tribes and not with individual Indians. (*Blackfeather* v. *United States*, 190 U. S., 368, 377.)

So, in the present case, the agreement was with the band and not with the individual members thereof. Therefore, any Indian title which might have existed to the Mille Lac Reservation was in the band itself, and when the majority of them voluntarily removed that title was gone. The contrary argument, followed to its logical conclusion, means that a single Indian remaining on the reservation could hold the title to it.

IV.

By accepting the conditions and benefits of the acts of 1889 and 1902, the Indians abandoned all claim to the Mille Lac tract.

A. The Nelson Act of 1889 was a final settlement with all the Minnesota Chippewas. The Mille Lac band accepted its terms, agreeing to remove to White Earth, and thereby ended all right of occupancy of the Mille Lac tract.

At the time of the passage of this act the Chippewas were widely scattered throughout northern Minnesota. The Lake Superiors occupied the four reservations—Grand Portage, Fond du Lac, Bois Forte, and Deer Creek—already mentioned; the Mississippi bands were upon two reservations, White Earth and the one just north of Leech Lake, while the Red Lake and Pembina bands still occupied an unceded tract in northern Minnesota.

It was the desire of the United States to gather these numerous bands of Indians upon one or two reservations and to open to settlement the vast tracts then occupied by the Indians.

At this time the Mille Lac Band were in this situation: The large majority of them had already removed to White Earth, but a remnant still lived in primitive Indian fashion on or near the old Mille Lac Reservation; three Secretaries of the Interior had ruled that the Mille Lac tract was public land open to settlement, and by virtue of homestead and preemption claims nine-tenths of the Mille Lac tract was then occupied and claimed by the whites, and

at least one-tenth of the tract had actually been patented. There was left for the occupancy of the remnant of the Mille Lac Indians but a little over 5,000 acres of land.

In this situation the United States, by the Nelson Act, offered that if all the Indians would remove, some to the White Earth Reservation and the others to the Red Lake Reservation, and would cede to the United States all their lands, such ceded lands would be sold and the proceeds applied to the use of the Indians, and that each Indian would be given an allotment in severalty on White Earth or Red Lake.

This offer was accepted by all the Indians, and each band made deeds expressing the acceptance of the provisions of the act, and ceding to the United States the specific reservations which they owned.

The Mille Lac Band with the others accepted the act, and thereby agreed that the remnant of their band still remaining on or near the old reservation would remove to White Earth.

The proviso of article 12 of the treaty of 1864, under which these Indians based their claim of title, simply provided that they *should not be compelled to remove*. The moment, therefore, they voluntarily removed, all claim of title would vanish. So, when they voluntarily agreed to remove and to accept the benefits of the Nelson Act, the proviso was at an end, for there then arose a compulsion to remove.

There was therefore no necessity for the cession of the old reservation, and while the Mille Lac Band were asked to and did sign deeds ceding all their interest in those portions of White Earth and Red Lake Reservations desired for settlement, when it came to the Mille Lac tract, their deed omitted the word cede and used only the word relinquish. The relinquishment, of course, was no more than a quitclaim, and even it was simply a precautionary measure, for the tract had long since been ceded to the United States, and all claims of occupancy ceased by the agreement to remove and without a cession.

The lands on the Mille Lac tract were not, therefore, to be sold under the Nelson Act. According to the terms of section 4, it was only lands which were *ceded* to the United States which were to be surveyed and sold. This land was not ceded nor was there any need for its cession. Nor, for the same reason, was the tract a reservation within the meaning of the proviso of section 3 of the Nelson Act authorizing an allotment in severalty on the particular reservation on which the Indian lived.

And this was the legislative construction given by subsequent acts of Congress to the Nelson Act.

It will be remembered that the Secretary of the Interior, after first taking this view of the Nelson Act, reversed himself and held that the Mille Lac tract should be disposed of under that act. (14 Land Dec., 497.)

In the meantime a large number of entries had been made upon the land. So, by the resolutions of 1893 and 1898, Congress declared that these and all other entries made on this land were valid and that the land was open to settlement, and thus expressly adopted and confirmed the construction theretofore given to the treaties and statutes by the several Secretaries of the Interior.

These legislative constructions are entitled to great weight.

The Committee on Indian Affairs of the House of Representatives, in its report on the resolution of December 19, 1893, which we use on the authority of United States *v.* Binns (194 U. S., 486), started out with the statement that "The Mille Lac Indian Reservation (owned by the Chippewas) was ceded to the United States in 1863 and had been declared open to entry by successive decisions by the Department of the Interior." (Cong. Rec., vol. 26, pt. 1, pp. 35, 36; 53d Cong., 2d sess.)

From the following extract from the report of the Secretary of the Interior, adopted as the report of the Committee on Public Lands on the resolution of May 27, 1898, it clearly appears that Congress did not recognize any rights of the Mille Lac Indians in the old Mille Lac Reservation:

> From the facts in the case, as disclosed by the reports of the Commissioner of Indian Affairs, it appears that by the treaties in 1863–4 these Indians ceded all their lands in

this reservation to the Government, taking other lands in lieu thereof; * * *

It would appear, therefore, that the Indians, after due consideration and in the most formal manner, have, by treaty and agreement duly executed, parted with all their rights to the lands in this reservation. That being true, it is not apparent why the equities of settlers who have in good faith gone upon these lands under the belief that they were vacant public lands of the United States and made valuable improvements on them, should not be recognized by the passage of some law that would permit said settlers to perfect their title to said lands. *Such an act would be no infringement upon the rights of the Indians, for the reasons above stated.*

(Cong. Rec., vol. 31, pt. 5, p. 4781; 55th Cong., 2d sess. Italics ours.)

It necessarily follows that the rights of the Indians were in no way violated by the opening of the Mille Lac tract to settlement, and there can, for that reason, be no recovery in this case.

No injustice was done to the Indians under this construction, for under the Nelson Act they were given the right to participate in the proceeds of a vast tract of land to which they in reality had no claim.

The census taken under the act showed 8,304 Chippewa Indians; of these 3,002 were Mississippi Chippewas, including the Mille Lac Band which numbered 895.

The total quantity of land ceded to the Government (less that necessary to give each Indian an allotment in severalty of 160 acres) was 4,407,931 acres. Of this the Mississippi Chippewas had owned 796,692 acres embraced in White Earth and the reservation north of Leech Lake, the remaining land belonging to the Red Lake and Pembina Bands.

As a result of the agreements under the act, the Mississippi Chippewas, including the Mille Lacs, numbering 3,002, secured the right to participate in the sale and allotments of 3,951,259 acres, in which they had no interest prior thereto. In return for this, the 5,302 other Chippewas secured the right to participate in only 796,672 acres, in which they had no interest prior thereto.

Apparently the Mille Lac Band were well paid for what they surrendered.

The judgment of the Court of Claims has this remarkable result—it not only amounts to double compensation to the Indians for their cession of this land in 1864, but the right of occupancy which is claimed to have been given to the small band of Indians as a reward for their good conduct in 1862, becomes an occupation for the benefit of the very Indians engaged in the outbreak against the whites and whom the Mille Lacs were rewarded for refusing to join.

The Government derived no pecuniary benefit from the cession and settlement of the Mille Lac Reservation.

The Government, so far from deriving any pecuniary advantage from the cession and settlement of the Mille Lac Reservation, expended large sums of money on the appellees at different times as a consideration for the cession of the Mille Lac Reservation. A very small part of the reservation was sold at $1.25 an acre under the general land laws as public lands.

Nearly all of the reservation was entered upon with soldiers' additional scrip, Chippewa half-breed scrip, and agricultural college scrip, from which the Government received no compensation. Not over 5,000 acres were sold to settlers at $1.25 an acre after the joint resolution of May 27, 1898, aggregating about $6,250, as against the great sums paid to or expended upon the Mille Lac and other Mississippi Chippewas.

B. The act of 1902.

The Indians by accepting the conditions and benefits of the act of May, 1902 (32 Stat., 268), abandoned the last vestige of claim to any part of the Mille Lac tract.

As already appears, all of the Indians had agreed to remove to White Earth when they accepted the provisions of the Nelson Act; however, some few of them remained on or near the old reservation. Therefore, the act of 1902, which was in reality a mere gratuity in order to secure the peaceful removal of this remnant, offered to pay not exceeding the sum of $40,000 "upon condition of said Indians removing from said Mille Lac Reservation."

It is noticeable that this act provides "for the payment to the Indians occupying, etc."; there is no reference to the Mille Lac Band as a band, but merely to the few scattered Indians who are remaining upon the reservation without right. When, therefore, the Indians accepted this statute, there could be no further claim to the Mille Lac land.

The mere fact that the agreement which the Indians signed contained a proviso "that nothing therein shall be construed to deprive them of any benefits to which they might be entitled under existing treaties and agreements not inconsistent with the treaty of 1902," is immaterial; they can not make any conditions, except those mentioned in the statute, to the acceptance of its provisions.

And as said by Judge Howry (R., 54), this is the mere general provision which has been inserted in every agreement made with the Indians since 1896, and no special significance is to be attached to it.

V.

If the Mille Lac Reservation be considered one of the reservations ceded by the Indians under the Nelson Act of 1889, their measure of damages is found in that statute. Section 6 excludes from sale under that act every tract on which there was a subsisting valid preemption or homestead entry. Such subsisting entries covered over 55,000 acres of the Mille Lac tract; only the remaining 5,000 acres could therefore be sold under the Nelson Act.

The judgment of the court below proceeds on the assumption that the Mille Lac Reservation was a

reservation ceded to the United States by the Chippewas within the meaning of the provisions of the Nelson Act, and that, with slight exceptions, the entire tract should have been sold as pine or agricultural land under that act; that the opening of the land to settlement under the public-land laws was a violation of the terms of the act, and that the Indians were entitled to the full value of the entire tract, even including the more than 7,000 acres which had already been patented. The judgment accordingly estimates the value of 34,480.89 acres of pine land and of 25,000 acres of agricultural land (R., 18, 40).

Assuming, for the purpose of the argument, that the Mille Lac tract should be treated as a reservation under the Nelson Act, the judgment below entirely overlooks the fact that 55,000 acres had been filed upon, and that under section 6 of the act such land can not be sold for the benefit of the Indians.

The proviso to this section is as follows:

> *Provided*, That nothing in this act shall be held to authorize the sale or other disposal under its provision of any tract upon which there is a subsisting, valid, preemption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the date of its allowance, and if found regular and valid, patents shall issue thereon: *Provided*, That any person who has not heretofore had the benefit of the homestead or preemption law, and who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either

of said laws may make a second homestead entry under the provisions of this act.

By March 31, 1884, 55,976.42 acres of the total acreage of 61,028.14 had been filed upon as open to settlement, and 7,792.16 acres had been patented. (R., 14, 20; 12 Land Dec., 54.)

It is difficult to understand how the court below avoids this proviso of said section 6. Certainly, those lands which had gone to patent were not to be sold for the benefit of the Indians. The United States did not undertake to engage in litigation; it simply promised to sell land which the Indians should cede; the title to the patented land had gone from the United States, and could not again be sold—(it is immaterial that the patents had not been delivered; United States *v.* Schurz, 102 U. S., 378)—nor did the Nelson Act commit the United States to make any payments for such lands; the Government was simply to make sale of the lands and apply the proceeds to the benefit of the Indians.

It will be contended for the Indians that the Mille Lac tract was an Indian reservation on which, under the law, entries could not be made, and that therefore there were no valid entries upon that tract. (See sec. 2257, R. S. U. S.)

But this contention goes too far, for it nullifies the entire proviso. The Nelson Act contemplated only the cession to the United States of Indian lands, and if there could be no valid entries on such lands the proviso was a foolish and useless thing. A statute will, if possible, be construed to have some effect.

(*U. S.* v. *Hartwell*, 6 Wall., 396; *Am. Sec. & Trust Co.* v. *D. C.*, 224 U. S., 491.)

The truth is that Congress by this provision recognized and preserved all subsisting entries, and directed that they be treated as if made on public lands, and patents issued if the claims were valid in all other respects; but all objections that the lands were not open to settlement were removed from the consideration of the land officers. This conclusion is inevitable from the subsequent language of the proviso: "Any such entry shall be proceeded with under the regulations and decisions in force at the date of its allowance, and if found regular and valid patents shall issue thereon." And it is strengthened by the further provision of the section that if the entrant had failed to perfect his title he might make a second homestead entry.

These entries were known both to Congress and to the Indians. Congress was making a liberal and beneficial settlement with the Indians, and this provision for prosecuting the pending entries to patent was an agreement that all land claimed under such entries should be excluded from sale.

The same conclusion is reached by another line of argument. As already stated, every subsisting entry was to be proceeded with under the regulations and decisions in force at the date of its allowance.

The term allowance here does not mean the issuance of the patent, but the receipt of the claim at the local land office and its acceptance for filing.

It already appears that all of the entries upon the 55,000 acres involved here were made at dates when the head of the Department of the Interior held the Mille Lac tract public land open to settlement. They were made in 1871 and 1872, and between Secretary Chandler's decision in 1877 and the act of 1884; it is true that some of these entries were canceled, but in 1882 they were all reinstated by Secretary Teller, and directed to be proceeded with. So that, under the regulations and decisions in force in the Department of the Interior, all of these entries were valid subsisting entries at the time of the passage of the Nelson Act.

Such was the conclusion of Secretary Noble in the Waters case, 12 Land Decisions, 52. Here, after describing the entries on the Mille Lac tract, the Secretary said:

> It is impossible for me to conclude, in view of these facts, that the provision of the act of January 14, 1889, was not intended to control the action of this department in the further consideration of the claims above mentioned pending in the General Land Office. It is to my mind clear that this is the "further legislation" required by the act of July 4, 1884, and that the words "subsisting valid preemption or homestead entries" embrace the entries upon which it is now asked by the petitioners patent may be issued. It is required that these shall be proceeded with under the regulations and decisions in force at the date of the allowance of these entries.

> These regulations and decisions exist in relation to these entries, the decisions being those of Secretary Chandler, dated March 1, 1877, and Secretary Teller, dated May 10, 1882, and the regulations being those set forth in the letter of Commissioner MacFarland, dated April 25, 1884, and there will be no further difficulty in following them.

It necessarily follows, therefore, that under any proper construction of the Nelson Act the rights of the Indians were not infringed by the perfection of the entries subsisting in 1889. Their damages are therefore confined under the most favorable aspect of the statute to the value of the lands not then entered upon.

If this construction of the law be correct, the case must be remanded with directions to ascertain the value of the small portion of the reservation which should have been sold under the Nelson Act.

VI.

If the Nelson Act be inapplicable, the loss sustained by the Indians is merely the value of their right of occupancy, and not the fee-simple value of the land.

Under the most favorable construction to them of the treaty of 1864, the Mille Lac Band had a mere right of occupancy during good behavior. This was not intended as a fee simple—for Article I of the treaty of 1864 used other and appropriate language to create fee-simple estates; nor did the language used create the ordinary Indian title, for that was never conditioned on good conduct.

It was a feeble and uncertain tenure, subject to determination upon violation of the condition. This did not give the Indians the right to cut the timber, except for their domestic use or for improving the land. United States *v.* Cook, 19 Wall., 591; act Feb. 16, 1889 (25 Stat., 673; 3 Fed. Stat. Ann., 377). By far the larger part of the present judgment consists in the value of the timber. The judgment should therefore be reduced to the value to the remnant of the band left on the reservation to occupy it in Indian fashion.

CONCLUSION.

The judgment should be reversed, with directions to dismiss the petition.

JESSE C. ADKINS,
Assistant Attorney General.
GEORGE M. ANDERSON,
Attorney.

APPENDIX A.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., 1st March, 1877.

SIR: I have considered the appeal of Frank W. Folsom from your decision of May 27th, 1876, affirming the action of the register and receiver in rejecting his D. S. dated May 1st, 1876, for the S. E. ¼ of N. W. ¼ and lots 1, 2, & 3 of sec. 6, T. 43, R. 27, Taylors Falls land district, Minnesota.

Your decision is based on the ground that the tracts mentioned were within the Mille Lac Indian Reservation.

This reservation was created by a treaty entered into by and between the United States and the Mississippi bands of Chippewa Indians (including the Mille Lac), dated February 22d, 1855 (10 Stats., 1165) and included the following fractional townships, viz, 42 N., R. 25 W., 42 N., R. 26 W., and 42 & 43 N., R. 27 W., and also three islands in the southern part of Mille Lac in the then Territory, now State, of Minnesota.

On the 11th of March, 1863, another treaty was entered into by and between the United States and said bands of Indians, by which all of the tracts included in said reservation were ceded to the United States. (12 Stats., 1249.)

In consideration of the cession so made the United States agreed, among other things, to set apart, and did set apart, for the future homes of the Chippewas

of the Mississippi other lands described in said treaty; to extend the annuities of said bands ten years beyond the periods mentioned in existing treaties; to pay certain sums of money for the purposes therein mentioned; to clear, stump, grub, and break, upon the reservation set apart for said Chippewas, a certain number of acres for each of said bands; to build houses for their chiefs, and to furnish them with teams and farming utensils, &c., for the period of ten years.

On the 7th of May, 1864, another treaty was entered into by and between the United States and the Chippewas of Mississippi and Minnesota, by which, in consideration of the cession aforesaid, other and additional lands were set apart as a reservation for said lands, and the sums of money to be expended by the United States for the objects therein mentioned were particularly stated.

The sums of money required by said treaty have been appropriated by Congress from time to time, and a full compliance with its terms has been made or tendered by the United States. A part of said band has been removed to White Earth Reservation and a part still remains at Mille Lac, although they have been repeatedly solicited to remove, and ample preparations were long since made on the former reservation for their permanent location thereon.

All of the conditions of said treaties having been complied with by the United States, the title to said lands now rests absolutely in the United States.

In your communication of the 30th ultimo, you state that "the reason said lands have been suspended from sale or other disposition is that, on the 22d of August, 1871, a request was made by the Indian Office that no part of said reservation be considered as

subject to entry or sale as public lands until notification to the General Land Office by the Indian Office that the lands comprising the reservation were no longer needed for Indian purposes."

This request of the Indian Office, from the communication of the Commissioner of Indian Affairs of the 29th ultimo, appears to have been made upon a construction given to the proviso to the 12th article of the treaty aforesaid, which is as follows: "That owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites."

Under this proviso it is true that, so long as said Indians do not interfere with the persons or property of the whites, they can not be *compelled* to remove; but it by no means gives them an exclusive right to the lands, nor does it, in my judgment, exclude said lands from sale and disposal by the United States.

It was anticipated evidently that these lands would be settled upon by white persons, that they would take with them their property and effects, and it was provided that so long as the Indians did not interfere with such white persons or their property, they might remain, not because they had any right to the lands, but simply as a matter of favor.

In this view of the case, and I am satisfied that this is the proper construction of said proviso, said lands are now, and were at the time Folsom offered to file his D. S., subject to preemption filing and entry.

But in view of the fact that there is now a part of said band of Indians upon said tract of lands, and also that there is no appropriation available for their immediate removal to the White Earth Reservation, you are hereby instructed to suspend the execution

of this decision and to direct the local officers to allow no filings or entries upon any of said lands included in the Mille Lac Reservation until the close of the next regular session of Congress, unless said Indians shall voluntarily remove therefrom prior to that date, and I further direct that, in the meantime, all existing claims or any of said lands, if any there be, remain *in statu quo*.

For the reasons herein stated, your decision is reversed, and the papers transmitted with your letter "G" of October 31st, 1876, are herewith returned.

Very respectfully,

Z. CHANDLER,
Secretary.

The COMR. OF THE GENL. LAND OFFICE.

APPENDIX B.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., 19th May, 1879.

SIR: I have received your letter of the 17th instant, inclosing the returns of the register of the U. S. land office at Taylors Falls, Minnesota, for the month of March, 1879, showing the number of entries made during that month on what is known as Mille Lac Indian Reservation, in said State, in violation of the instructions of this department and of your office, and stating that said entries "are invalid, and if it meets the Secretary's approval they will be at once cancelled by this office, and the parties advised."

I concur in your opinion, and you will please cancel said entries and notify the parties accordingly.

The papers transmitted are herewith returned.

Very respectfully,

C. SCHURZ,
Secretary.

The COMR. OF THE GENL. LAND OFFICE.

APPENDIX C.

OPINION OF SECRETARY TELLER OF MAY 10, 1882.

DEPARTMENT OF THE INTERIOR,
Washington, May 10, 1882.

SIR: I have the honor to acknowledge the receipt of your letter of the 26th of April concerning the Mille Lac Reservation in the State of Minnesota. I have carefully considered the same, and after an examination of the statutes cited and the action of my predecessors, Hon. Z. Chandler and Hon. Carl Schurz, I feel constrained to substantially adhere to the decision made by Mr. Chandler. I do not think there can be any controversy as to the status of the Indians on that reservation. The twelfth article of the treaty of 1863 provides as follows:

"It shall not be obligatory upon the Indians, parties to this treaty, to remove from their present reservations until the United States shall have first complied with the stipulations of articles 4 and 6 of this treaty, when the United States shall furnish them with all necessary transportation and subsistence to their new homes, and subsistence for six months thereafter: *Provided*, That owing to the heretofore good conduct of the Mille Lac Indians they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites."

This proviso gave to this band of Indians the right to remain on the reservation until they should voluntarily remove therefrom. At the time of the

making of the treaty there was a large number of other Indians who either resided on the reservation or had the right to do so, who were to be removed; but, owing to the good conduct of these Indians, they were not compelled like their brothers to go to the White Earth Reservation. It has been insisted that the proviso allowing the Mille Lac Indians to remain gave them the exclusive permission to occupy the entire reservation to the exclusion of white settlers.

By the treaty of February 22, 1855, it was provided in article 2 that the President might at any time he considered it advisable assign to each head of a family, or singly, 80 acres of land for his or their separate use. It does not appear that this was done, and it is to be presumed that whatever portion of the Mille Lac Reservation was occupied by the Mille Lac Indians at the time of the making of the treaty of 1863 was occupied in common and not held in severalty. Whatever title they had passed by this treaty to the United States, nothing remained in the Indians; but the Government saw fit to say that they need not remove therefrom until they were ready to do so. It was undoubtedly understood by the Government and the Indians that the Indians would ultimately remove therefrom to White Earth, as provided in the treaty, but they have refused to do so, and still refuse.

The interests of the Indians undoubtedly require their removal; but this can not be done by the department, except with their consent, unless the Indians by disturbing the whites have forfeited their right to remain. It is alleged that they have forfeited their right; this, however, has been denied. No provision is made in the treaty for determining a controversy on this point, and it ought not to be

adjudged against the Indians except on the clearest proof. This does not appear to exist, and therefore it must be presumed that the Indians are rightfully on the reservation and entitled to the protection of the Government in all that was given them by the proviso in article 12.

The question is whether they may occupy the whole reservation or only the part that is necessary to make good the promise of the proviso of section 12. It is not claimed that they originally occupied the entire reservation or that it is now necessary to exclude white settlers therefrom to keep in good faith the treaty with them. I conclude that whatever they actually occupied in 1863 they are entitled now to occupy; if they have increased the area of their occupation they are entitled to that, if such occupation was prior to the occupancy by white people.

The reservation was public land open to homestead and preemption claims, subject only to the rights of the Indians to reside thereon and not to remove therefrom until they wish so to do. Good faith required the Government to reserve for them as much land as they needed. This could not be more fairly determined than by conceding to them all they had previously occupied. I understand the number of Indians on that reservation is about five hundred, while the reservation contains seven townships and three small islands. You will therefore ascertain as soon as practicable the quantity of land heretofore occupied by the Indians, as well as the quantity necessary for their support (if the quantity now occupied is insufficient), and report the same to this office, in order that such land may be reserved from the operation of the homestead and preemption laws,

so that the remainder of the reservation may be occupied by the settlers who have in good faith attempted settlement thereon.

If you think it desirable, I will send an inspector there to examine and report on the area now occupied by the Indians, or you may ascertain the fact through your own agencies, as you prefer.

Very respectfully,

H. M. TELLER,
Secretary.

Hon. HIRAM PRICE,
Commissioner of Indian Affairs.

APPENDIX D.

OPINION OF SECRETARY LAMAR OF OCTOBER 23, 1886.

The following communication was telegraphed on October 23, 1886, by the Secretary of the Interior to the commissioners appointed under the act of May 15, 1886 (24 Stat., 44), while they were in council with the Mille Lac Indians endeavoring to secure the peaceable removal of about 200 of said band who still remained on the former Mille Lac Reservation (Sen. Ex. Doc. No. 115, 49 Cong., 2d sess., pp. 18 & 21):

ACTING COMMISSIONER OF INDIAN AFFAIRS:

In view of all the facts connected with the Mille Lac Indians and their reservation, the President hears with great surprise and disappointment that they have refused to give their consent to remove to the White Earth Reservation, where they would be beyond the reach of avaricious white men, and where they would have good homes with peace and plenty. If they persist in remaining on their old reservation, they must do so at their own risk and with the disapprobation of the Government. It is the desire of the President that the commissioners explain fully to these Indians the condition of affairs; that they have ceded the lands of the Mille Lac Reservation to the United States, and are permitted to remain there only so long as they shall not in any way interfere with or molest the persons or property of the whites. The President desires that the commissioners shall make another effort to induce these Indians to

remove to White Earth, where all the Chippewas will be united in one happy and prosperous family. The commission should say to them that it is the earnest desire of the President that they remove to White Earth, and that their interests, and that only, prompts the Government in urging them to take this step. The Indians should give the matter the most careful consideration, as the future welfare and happiness of themselves and children depends upon their their decision in this matter.

L. Q. C. LAMAR,
Secretary.

APPENDIX E.

DEPARTMENT OF THE INTERIOR,
Washington, January 21, 1891.

COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: I acknowledge the receipt of your communication of 20th instant in reply to department reference of letter of Honorable S. G. Comstock, House of Representatives, requesting an estimate of cost of completing the necessary surveys within the Chippewa Indian reservations in Minnesota, under the provisions of the act of January 14, 1889, wherein you refer to department decision of 9th instant regarding the Mille Lac lands and suggest a doubt as to whether the lands in said reservation are to be disposed of under the provisions of the act of January 14th, 1889, or as other public lands under the general laws, and ask to be specifically instructed in reference to this point.

In reply, you are informed that as department decision of 9th instant held "that the lands upon which the Mille Lacs have enjoyed the favor of residence, so long as they should not interfere with the whites, is equivalent to a declaration that this favor or license did not amount in effect to a reservation of these lands upon which the Mille Lacs could take allotments," etc., the Mille Lac lands should be disposed of as other public lands under the general laws, and consequently will not be surveyed under the act of January 14, 1889.

In transmitting your estimate to Mr. Comstock, I have called his attention to this matter.

Very respectfully,

JOHN W. NOBLE,
Secretary.

G. C.

APPENDIX F.

This agreement made and entered into this thirtieth day of August, nineteen hundred and two, by and between James McLaughlin, U. S. Indian inspector, and Simon Michelet, U. S. Indian agent, on the part of the United States, party of the first part, and the Mille Lac Chippewa Indians residing on the former Mille Lac Indian Reservation, in the State of Minnesota, parties of the second part, witnesseth:

That whereas by act of Congress of the United States approved May 27, 1902, there was appropriated the sum of forty thousand dollars ($40,000), or so much thereof as might be necessary, for payment to the Indians occupying the Mille Lac Indian Reservation, in the State of Minnesota, for improvements made by them, or any of them, upon lands occupied by them on said Mille Lac Indian Reservation, said payment to be made upon investigation, examination, and appraisment by the Secretary of the Interior, upon condition of said Indians removing from said Mille Lac Reservation.

And whereas the improvements above referred to have been appraised by said James McLaughlin, U. S. Indian inspector, and said Simon Michelet, U. S. Indian agent, under direction of the Secretary of the Interior, at the aggregate sum of forty thousand dollars ($40,000), as per itemized list of appraisements hereto attached and made a part hereof:

Therefore the said party of the first part covenants and agrees to pay to the said parties of the second

part the said sum of forty thousand dollars ($40,000), said payment to be made on the former Mille Lac Indian Reservation, in the manner set forth in the annexed council proceedings as soon as practicable after the approval of this agreement by the Secretary of the Interior.

Now, therefore, in consideration of the covenants and agreements of the party of the first part herein contained, the said Mille Lac Indians occupying the former Mille Lac Indian Reservation, parties of the second part, hereby accept the appraisement made by James McLaughlin, U. S. Indian inspector, and Simon Michelet, U. S. Indian agent, of even date herewith, aggregating forty thousand dollars ($40,000), as full compensation for improvements made by them, or any of them, upon lands occupied by them, on said Mille Lac Reservation, and also accept the terms and conditions of said act of Congress and agree to remove from said Mille Lac Indian Reservation (except the excepted classes provided for in said act of Congress) upon payment to them of the said appraised sum of forty thousand dollars ($40,000), in the manner provided in the annexed council proceedings, as soon thereafter as notified by the proper authorities that the necessary arrangements have been made for them upon the White Earth Reservation or any of the ceded Indian reservations in the State of Minnesota on which allotments are made to Indians, said Indians to notify the disbursing officer when said payment is being made to them as to the reservation they elect to take allotments upon.

It is understood that nothing in this agreement shall be construed to deprive the said Mille Lac Indians of any benefits to which they may be entitled under existing treaties or agreements not incon-

sistent with the provisions of this agreement or the act of Congress relating to said Indians approved May 27, 1902.

In witness whereof the said James McLaughlin, U. S. Indian inspector, and the said Simon Michelet, U. S. Indian agent, on the part of the United States, and the male adult Indians occupying the former Mille Lac Indian Reservation in the State of Minnesota, have hereunto set their hands and seals at Lawrence, Mille Lacs County, Minnesota, this thirtieth day of August, A. D. nineteen hundred and two.

JAMES MCLAUGHLIN,
U. S. Indian Inspector.
SIMON MICHELET,
U. S. Indian Agent.

○

MAP

TOO

LARGE

FOR

FILMING

No. 736

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912

THE UNITED STATES,
Appellant,

—VS.—

THE MILLE LAC BAND OF CHIPPEWA INDIANS IN THE STATE OF MINNESOTA,

---

BRIEF FOR APPELLEE.

GEORGE B. EDGERTON,
Attorney for Appellee.

F. W. HOUGHTON,
HARVEY S. CLAPP,
DANIEL B. HENDERSON,
Of Counsel for Appellee.

THE CRANE PRESS

SUBJECT INDEX

Page of Brief.

STATEMENT.

THE RECORD 1

FACTS SHOWN IN FINDINGS 2

FACTS NOT SHOWN IN FINDINGS 8

CONCLUSION ON FACTS 14

POINTS AND AUTHORITIES 15

ARGUMENT.

I.—Under the act of February 15, 1909 (32 Stat. L., 619), which reads as follows:

> That the Court of Claims be, and it is hereby, given jurisdiction to hear and determine a suit or suits to be brought by and on behalf of the Mille Lac Band of Chippewa Indians, in the State of Minnesota, against the United States, on account of losses sustained by them, or the Chippewas of Minnesota, by reason of the opening of the Mille Lac Reservation in the State of Minnesota, * * * to public settlement, under the general land laws of the United States; and from any final judgment or decree of the Court of Claims either party shall have the right to appeal to the Supreme Court of the United States, * * * equity jurisdiction is not conferred upon the Court of Claims, and hence the finding of the Court of Claims determine all matters of fact precisely as the verdict of a jury 20

II.—The jurisdictional act was correctly interpreted by the Court of Claims 23

Page of Brief.

III.—The jurisdictional act gives to the Court of Claims jurisdiction to determine the losses suffered by the Mille Lac Band of Chippewa Indians in the State of Minnesota or the Chippewas of Minnesota, by reason of the opening of the Mille Lac Reservation in the State of Minnesota to public settlement under the general land laws of the United States 25

IV—By each of the treaties, to wit: of March 11, 1863, and May 7, 1864, the Mille Lac Reservation was reserved to the Mille Lac band of Chippewas of the Mississippi, the appellee herein, as and for an Indian Reservation, to be occupied by them as such so long as they should not in any way interfere with or molest the persons or property of the whites 27

V.—The Court will construe the treaties of March 11, 1863, and May 7, 1864, and the instrument by which the Mille Lac Band relinquished their right of occupancy on the Mille Lac Reservation as the Indians understood such treaties and such instrument 40

VI.—By the very instrument of cession and relinquishment by the Mille Lacs to the United States on October 5, 1889, thereafter approved by President Harrison, the United States acknowledged and confirmed the Indian title of the Mille Lac Reservation to be then in the Mille Lac Band of Chippewas of Mississippi 47

VII.—The relinquishment of the Mille Lac Reservation was obtained from the Mille Lacs with the understanding and belief on their part that such reservation would be classified into pine lands and agricultural lands, the pine lands estimated and sold, and, after allotments of the agricul-

Page of Brief.

tural lands were made, the remaining agricultural lands would be sold, and the moneys received from both paid into the United States Treasury under and in accordance with the provisions of said act of January 14, 1889 59

VIII.—Such cession and relinquishment of the Chippewa Indians of Minnesota of their various reservations in Minnesota under the act of January 14, 1889, including the cession and relinquishment of the Mille Lac Band of Chippewas of Mississippi and its relinquishment of the Mille Lac Reservation was a cession and relinquishment of each of said reservations to the United States in trust, which trust is expressed in the provisions of the act of January 14, 1889 60

IX.—The failure of the United States to carry out the provisions of the act of January 14, 1889; the passing of the joint resolution of December 19, 1893 (28 Stat. L., 576), confirming the large number of entries theretofore made upon the Mille Lac Reservations and confirming the title in such entrymen constitute such failure of duty on the part of the United States as gives the Mille Lac band a right of act against the United States for damages under the jurisdictional act 61

X.—The measure of damages for the opening up of such reservation to settlement under the public land laws is the reasonable value of the pine timber and agricultural lands on such reservation on December 19, 1893, with interest thereon at the rate of 5 per cent. from such date.... 68

Page of Brief.

XI.—The passage of the joint resolution of December 19, 1893 (28 Stat. L., 576), and the passage of the joint resolution of May 27, 1898 (30 Stat. L., 745), do not indicate any intention on the part of Congress to confiscate the Mille Lac Reservation, or that in the exercise of its plenary power Congress intended to take from the Chippewas of Minnesota the value of such reservation 71

XII.—Undoubtedly Congress with the consent of all the Indians had the right to pool the interests of all the Chippewa Indians of Minnesota, calssify and sell their lands and divide the proceeds among them as provided by the act of January 14, 1889 77

XIII.—The judgment of the Court of Claims should be affirmed 87

EXHIBIT "A." 90

INDEX OF CASES CITED.

—o—

	Page of Brief.
California & Oregon Land Co. v. Worden, 85 Fed. R. 94	17, 34
California & Oregon Land Co. v. Rankin, 87 Fed. R. 532	17, 34
Cherokee Intermarriage cases (Red Bird v. U. S.), 203 U. S. 76	17
Cherokee Nation v. Hitchcock, 187 U. S. 294	20, 75
Choctaw Nation v. U. S., 119 U. S. 1	17, 19, 64
Fond du Lac, 34, C. Cl. 426	81, 84
Harvey v. U. S., 105 U. S. 671	16
Jones v. Meehan, 175 U. S. 1	17, 32, 41
La Abra Silver Mining Co. v. U. S., 175 U. S. 423	16
Leavenworth, etc., R. R. Co. v. U. S., 92 U. S. 733	16, 33
Lone Wolf v. Hitchcock, 187 U. S. 553	17, 19, 20, 65, 73
McClure v. U. S., 116 U. S. 145	15
Minnesota v. Hitchcock, 185 U. S. 373	17, 18
Mitchell v. U. S., 15 Pet. 52	16
Red Bird v. U. S. (Cherokee Intermarriage Cases), 203 U. S. 76	17
Spalding v. Chandler, 160 U. S. 394	17, 19, 33
Stewart v. U. S., 206 U. S. 185	
Stone v. U. S., 164 U. S. 380	15
Tillson v. U. S., 100 U. S. 43	15
United States v. Blackfeather, 155 U. S. 180	19, 62, 69

Page of Brief.
United States v. Carpenter, 111, U. S. 347 .....19, 66
United States v. Cherokee Nation, 202 U. S. 101..... 19
United States v. Choctaw, etc., Nation, 179 U. S. 494 17
United States v. Old Settlers, 148 U. S. 427 .....16, 19
United States v. Thomas, 151 U. S. 577 17
United States v. Winans, 198 U. S. 371 ..... 17, 35, 40
White v. Wright, 83 Minn. 222 ..... 18, 49
Worcester v. Georgia, 6 Pet. 515 ..... 16, 17

INDEX TO ACTS, TREATIES, STATUTES AND RESOLUTIONS.

Treaty of September 30, 1854, 10 Stat. 1109.
Treaty of February 22, 1855, 10 Stat. 1165.
Treaty of March 11, 1863, 12 Stat. 1249.
Treaty of May 7, 1864 (Proclaimed March 20, 1865), 13 Stat. 693.
Treaty of March 19, 1867, 16 Stat. 719.
Executive Order, October 19, 1873.
Act of July 4, 1884, 23 Stat. 98.
Act of May 15, 1886, 24 Stat. 44.
Act of January 14, 1889, 25 Stat. 642.
Act of July 22, 1890, 26 Stat. 290.
Joint Resolution, December 19, 1893, 28 Stat. 576.
Joint Resolution, May 27, 1898, 30 Stat. 745.
Act of May 27, 1902, 32 Stat. 268.
Act of June 27, 1902, 32 Stat. 401.
Act of Feb. 15, 1909, 35 Stat. L. 619.

IN THE

Supreme Court of the United States

THE UNITED STATES, *Appellant*,

vs.

THE MILLE LAC BAND OF CHIPPEWA INDIANS IN THE STATE OF MINNESOTA.

No. 736.

APPEAL FROM THE COURT OF CLAIMS

BRIEF AND ARGUMENT ON BEHALF OF APPELLEE.

STATEMENT.

THE RECORD.

The appellee, Mille Lac band of Chippewas in the State of Minnesota, under the jurisdictional act of February 15, 1909, (35 Stat. L., 619, Rec. p. 7), brought suit against the United States to recover their damages on account of the opening of the Mille Lac reservation to public settlement

under the general land laws, which reservation was reserved to the Mille Lac band of Indians under the treaties of 1863 and 1864, and relinquished by it to the United States, under the act of January 14, 1889, to be sold as provided in such act, and the moneys paid into the United States Treasury for the benefit of the Chippewas of Minnesota as provided in such act.

The suit was tried and judgment rendered in the Court of Claims in favor of the claimants on the 29th of May, 1911, for the sum of $764,210.89. Thereafter a motion for new trial was made by appellant and a motion to correct the findings by the appellee, and after hearing had on the 6th day of May, 1912, the motion for new trial was denied, the motion to correct the findings by appellee was granted in part, and thereupon the Court of Claims made and filed its findings of fact and conclusion of law thereon and entered judgment in favor of the appellee and against the appellant for the sum of $827,580.72. Rec. p. 1-18.

This is an appeal from such judgment.

The jurisdictional act does not confer upon the Court of Claims special equity jurisdiction.

The Facts Shown in Findings.

Inasmuch as counsel for appellant have not stated the facts as counsel for appellee understand them and as the Court of Claims have found the facts to be, we deem it necessary to make a statement of facts, as follows:

The Chippewas of the Mississippi in 1855 were composed of six bands of Indians, known as the Gull Lake, Sandy Lake, Rabbit Lake, Pokagomin Lake, Rice Lake, and Mille Lac bands.

On February 22, 1855, the United States made a treaty with the Chippewas of the Mississippi, the Pillager and Lake Winnibigoshish bands of Indians.

By such treaty such Indians ceded to the United States all their lands in the State of Minnesota, which consisted of about ten million acres. In consideration for such cession the United States by such treaty reserved and set apart a sufficient quantity of land for the permanent homes of said Indians.

For the Pillager and Lake Winnibigoshish bands three separate tracts were reserved and set apart.

For the Chippewas of the Mississippi six distinct and separate reservations were reserved and set apart, one for each of the six bands.

It was apparently the purpose of the Government to have the members of each of said bands of Chippewas live together on one reservation. Accordingly, each of the six different bands remained upon the reservation bearing its name. So the Mille Lac band remained upon the Mille Lac Reservation.

Nevertheless, the six bands of Chippewas of the Mississippi had a joint interest in each of said reservations.

In 1862 such Mille Lac band was instrumental in preventing a general uprising of the Chippewas, incited by Chief Hole-in-the-Day, against the United States.

Such good conduct of the Mille Lac band was rewarded by the Government under the provisions of the treaties hereinafter mentioned.

On March 11, 1863, and May 7,1864, respectively, the United States again entered into a treaty with the Chippewas of the Mississippi, the Pillager and Winnibigoshish bands of Indians.

By each of said Treaties, *all* the said six reservations so reserved and set apart for the Chippewas of the Missis-

sippi under the treaty of 1855, *except the Mille Lac Reservation,* were ceded back to the United States.

By each of these two treaties the Gull Lake, Sandy Lake, Rabbit Lake, Pokagomin Lake and Rice Lake bands of Chippewas of the Mississippi, with the consent, and at the suggestion, of the United States, *in effect,* ceded all their right and interest in the Mille Lac Reservation to the Mille Lac band; such Mille Lac Reservation was by the terms of each of such treaties *reserved* to the Mille Lac band and made the separate and sole property of the Mille Lac band, to be occupied by such band as an Indian Reservation so long as the Mille Lac band of Indians in no way interfered with the persons or property of the whites.

In other words, the Mille Lacs by each of the treaties of 1863 and 1864 became possessed of the Indian title in and to the Mille Lac Reservation.

Such Mille Lac Reservation consisted of *four* fractional townships and three small islands in Mille Lac, and contained in the aggregate 61,028.14 acres of land.

In October, 1889, the six bands of Chippewas of the Mississippi numbered 3,002, of which 895 were Mille Lac Indians.

On October 5, 1889, the Mille Lac band of Indians was still in possession of such Mille Lac Reservation, claimed to be the sole owner thereof, was possessed of exclusive right of occupancy of such Reservation and had never done anything to forfeit any of the rights in such Reservation reserved to such band in each of the treaties of March 11, 1863, and May 7, 1864.

On January 14, 1889, Congress passed an "act for the relief and civilization of the Chippewa Indians in the State of Minnesota." (25 Stat. L., 642, Rec. p. 15.)

Thereafter the president of the United States, pursuant to such act, appointed three Commissioners.

Such Commissioners at once qualified by giving a bond and taking the oath required by such act; the census of the several Indian tribes was taken, and negotiations were commenced, pursuant to the provisions of such act, to obtain the cession and relinquishment from all the Indians mentioned in such act of all their lands in the State of Minnesota, except the White Earth and Red Lake Reservations, and so much of each of those as was not needed for allotment as provided in such act.

Council at Mille Lac.

On October 2, 3, 4 and 5, 1889, councils were had by said Commissioners with the Mille Lac band of Indians at Mille Lac, with the result, that, on October 5, 1889, the Mille Lacs ceded to the United States all their right, title and interest in and to so much of Red Lake and White Earth Reservations as should not be required for allotments, as in such act provided; all of the right, title and interest in and to the lands reserved to them in the first article of the treaty proclaimed April 18, 1867, also to the Executive Order addition thereto made and described in Executive order dated October 19, 1873; and, *did forever relinquish to the United States their right of occupancy on the Mille Lac Reservation reserved to them by the treaty of March* 11, 1863, *and May* 7, 1864, on the condition and with the express promises on the part of the United States, through its Commissioners, that as soon as it could be reasonably done, the United States would, under the direction of the Interior Department, cause such lands of the Mille Lac Reservation to be examined in forty acre tracts, and those upon which pine timber should be found *classified as "pine lands,"* and all other lands of such Reservation *classified as "agricultural lands."*

The pine was then to be estimated on each of the forty acre tracts. Thereafter all of such pine lands, in accord-

ance with the provisions of said act, were to be sold at public auction to the highest bidder in forty acre tracts at not less than three dollars per thousand feet, board measure, of the pine timber estimated to be upon each of said forties.

The moneys arising from the sale of such pine lands were to be paid into the United States Treasury; the principal sum to draw interest at five per cent. per annum for 50 years, the interest to be paid annually, and at the expiration of the period of 50 years the principal sum to be distributed as provided in such act.

By the provisions of such act each of the Mille Lac Indians might, in his discretion, take allotment of the agricultural lands on the Mille Lac Reservation, or, in his discretion, take allotment upon the White Earth Reservation.

It was also provided that when any of the agricultural lands on such reservation, not allotted under such act, nor reserved for the future use of said Indians, have been surveyed, the Secretary of the Interior shall give 30 days notice by publication, and at the expiration of 30 days the said agricultural lands so surveyed shall be disposed of by the United States to actual settlers *only* under the provisions of the homestead law; provided, that each settler, under and in accordance with the provisions of said homestead laws, shall pay to the United States for the land so taken by him the sum of $1.25 for each and every acre, in five equal annual payments, and shall be entitled to patent therefor only at the expiration of five years from the date of entry, according to the homestead laws, and after the full payment of said $1.25 per acre therefor and due proof of occupancy for said period of five years.

The moneys arising from the sale of the agricultural lands were to be paid into the United States Treasury, draw interest and be distributed the same as the moneys derived from the sale of pine lands.

Thereafter, in accordance with the provisions of said act of January 14, 1889, such cession and relinquishment was ratified by President Harrison, and was approved by him on the 4th day of March, 1890.

Notwithstanding the provisions of said act of January 14, 1889, and the promises and agreements of the United States, through its said Commissioners, the United States did not examine and classify such lands as "pine lands" and "agricultural lands;" did not make any estimate of the pine timber upon such lands; did not sell such pine lands or pine timber; the United States, through the Interior Department, refused to permit the Mille Lac Indians to take allotment on such Reservation; the entire reservation was opened to public settlement, such reservation was extinguished as an Indian Reservation; all the rights of the Mille Lacs in and to such Reservation were denied; their pine timber and pine lands were allowed to be taken by white settlers; and the Mille Lacs were deprived of their reservation for homestead and every other purpose whatsoever.

Between 1871 and the time of such relinquishment in October, 1889, fraudulent entries covering about 55,000 acres of land had been made upon the Mille Lac Reservation.

By the rulings of the Interior Department and legislation of Congress these entries had been declared fraudulent and held in suspense.

By subsequent legislation, hereinafter referred to, some of these entries were legalized, and finally the entire Reservation was thrown open to public entry under the general land laws of the United States.

At the time of the taking of such Reservation there were upon such Reservation large bodies of pine timber of great value, and many thousand acres of such Reservation were good agricultural land. Rec. pp. 7-18.

Facts Not Shown in Findings.

Inasmuch as counsel for appellants have disregarded the *findings,* and in their brief have made many statements of facts not found in the Record, and have referred to various public documents and reports, and, as counsel for appellee believe, are in error in such statement of facts, we refer to the following facts not found in the findings, most of which facts, however, are found in H. R. Ex. Doc. 247, 51st Cong., 1st Sess., referred to by the Court of Claims in the Finding of Fact, VI, Rec. p. 11 and offered in evidence in the Court of Claims.

This document contains the act of January 14, 1889, in full, the minutes of the proceedings of the councils between the Commissioners and the Indians at the various reservations; the ten instruments by which the Indians ceded and relinquished to the United States the ten reservations, and the approval of President Harrison of each of such cessions and relinquishments; the letter of transmittal by the Commissioners to the Commissioner of Indian Affairs, accompanying the account of the proceedings; the letter of transmittal by the Commissioner of Indian Affairs to the Secretary of the Interior, the letter of transmittal by the Secretary of the Interior to the President of the United States, and the letter of the President to Congress.

We believe it is proper to refer to certain facts found in such document concerning which there can be no dispute.

On page 9 thereof there is given in tabulated form the census taken by such Commissioners, which shows the number of adults, minors and orphans found by the Commissioners upon each of said ten Chippewa Reservations in Minnesota.

Those given on the Mille Lac Reservation are as follows: Total 895; male adults, 213; female adults 289; male minors 180; female minors 204; male orphans 6; female orphans 3.

That there may be no mistake concerning this, we print the entire statement as found on page 9, except the recapitulation, and marked Exhibit "A."

In the letter of transmittal to the President by Secretary Noble, dated January 30, 1890, he says concerning the Mille Lac Indians:

> "The Indians at Mille Lac were found to be intelligent, cleanly, and well behaved, and of good reputation among the neighboring whites." H. R. Ex. Doc. 247, 51st Cong., 1st Sess., p. 5.

In the letter of transmittal by the Commissioners to the Secretary of the Interior, dated December 26, 1889, the Commissioners said the following:

> "On the 2d of October we met the Mille Lac Indians, and were with them until the close of the 5th, and almost constantly in council.
>
> "Contrary to the general opinion, we found them intelligent, cleanly, and well behaved. Their neighboring white settlers gave them a good name. Some who had been on these borders for many years said they had never been molested in person or property by them." Ib. 22.

At the beginning of page 28 in said document is the following printed statement:

"Schedule showing the number of acres in the Chippewa Reservations in the State of Minnesota.

"Bois Fort	107,509
Deer Creek	23,040
Fond du Lac	92,346

Grand Portage	51,840
Leech Lake	94,440
Mille Lac	61,014
Red Lake and Pembina bands	3,200,000
Vermillion Lake	1,080
White Earth	796,672
Winnebagoshish, Cass Lake, and White Oak Point	329,000
Total	4,747,931"

In the report of the Commissioner of Indian Affairs for 1890 is a letter by John W. Noble, Secretary, bearing date March 5, 1890, which letter, after referring to the said act of January 14, 1889, and its various provisions, the proceedings of the Commissioners in obtaining the cession and relinquishment thereunder, and the approval thereof by President Harrison, concludes as follows:

> "Therefore, this is to give notice that none of said land, whether "pine lands" or "agricultural lands," within the said reservations of said Chippewa Indians in Minnesota, viz: White Earth, Red Lake, Leech Lake, Cass Lake, Lake Winnebogoshish, White Oak Point, Mille Lac, Fond du Lac, Boise Fort, Deer Creek, and Grand Portage, are open or will be open to sale or to settlement by citizens of the United States until advertisement to that effect, as required in said act, shall be given, and then only as provided in said act. All persons are, therefore, hereby warned not to go upon any of the lands within the limits of the reservations as heretofore existing for any purpose or with any intent whatsoever. No settlement or other rights can be secured upon

said lands, and all persons found unlawfully thereon will be dealt with as trespassers and intruders."

(Report of Commissioners of Indian Affairs, 1890, pp. XLII, XLIII.)

On page 113 of the same Report is found a tabulated statement, showing the number of Indians located at each of the ten reservations so ceded under the act of January 14, 1889. In such statement is given the males, 18 years and upwards; females, 14 years and upwards; school age, 6 to 16; total number of males, total number of females, and total number located at each of said reservations.

The number given in such tabulated statement located at the Mille Lac Reservation is as follows:

Males, 18 years and upwards, 217; females, 14 years and upwards, 317; school age, 6 to 16, 273; total number of males 407; total number of females, 481; total number of Mille Lacs located at Mille Lac, 888.

This number of Mille Lac Indians were located at the Mille Lac Reservation in the year 1890, as shown by this report.

We also refer to the Report of Commissioner of Indian Affairs for the year 1893, which report is dated September 16, 1893. On page 168 of such report is a tabulated statement similar in character to the one of 1890 just referred to.

The number of Mille Lacs located on the Mille Lac Reservation, according to that report, were males, 18 years old and upwards, 249; females, 14 years old and upwards, 309; school age, 6 to 16 years and upwards, 285; total number of males, 470; total number of females, 520; total Mille Lacs, 990.

There is, however, the following immediately below such tabulated statement:

"NOTE.—Two hundred and twelve removals from Leech Lake to White Earth and 212 removals from Mille Lac Reservation are included in their original bands."

This note then fixes and determines the fact that in the year 1893 there were living on Mille Lac Reservation of the Mille Lac band of Chippewa Indians 990 less 212, or 788 Mille Lac Indians.

In the report of the Commissioner of Indian Affairs for the year 1902, dated September 26 of that year, on page 224 is found a tabulated statement of the total number of Indians remaining on the Mille Lac Reservation, which is given as 870.

In the report of the Commissioner of Indian Affairs, dated September 4, 1903, page 187, the statement shows the number of Mille Lacs remaining on the Mille Lac Reservation to be 828.

And in the report for 1904, dated September 2, 1904, page 222, the number of Mille Lacs remaining on the Mille Lac Reservation at such time is shown to be 723.

OWNERS OF THE TEN CHIPPEWA RESERVATIONS IN MINNESOTA IN 1889.

An examination of the 10 instruments of cession and relinquishment beginning on pages 28, 32, 35, 43, 49, 56, 59, 61, 64, respectively, of said Document 247, will show that the 10 Reservations belonging to the Chippewas of Minnnesota prior to such cession and relinquishment under the act of January 14, 1889, were owned as follows:

The Chippewas of the Mississippi were the exclusive owners of the White Earth Reservation under the Treaty of March 19, 1867, and were also joint owners with the

other Chippewas of Minnesota of the Red Lake Reservation.

The Mille Lac band of Chippewas of the Mississippi was the exclusive owner of the Mille Lac Reservation.

The Red Lake band of Chippewas, residing on Red Lake Reservation, and the Pembina band of Chippewa Indians, were joint owners with the other Chippewas of Minnesota, including the Chippewas of the Mississippi, of the Red Lake Reservation.

The Pillager and Lake Winnibigoshish bands were the owners of Leech Lake, Cass Lake and Lake Winnibigoshish Reservations, and were joint owners with the other Chippewas of Minnesota of the Red Lake Reservation.

The Grand Portage band was the owner of the Grand Portage Reservation, and was a joint owner with the other Chippewas of Minnesota of Red Lake Reservation.

The Fond du Lac band was the owner of the Fond du Lac Reservation and joint owner with the other Chippewas of Minnesota of Red Lake Reservation.

Boise Fort and Deer Creek bands were the owners of Boise Fort and Deer Creek Reservations, and were joint owners with the other Chippewas of Minnesota of the Red Lake Reservation.

Finding VI of the Court of Claims concludes with the following statement:

> "The said Mille Lac Indians have, without exception, upon all occasions and in connection with all controversies relating to the title they possessed to the reservation set apart to them by the treaty of 1855, proclaimed and persisted in their claim of the right of occupancy to said reservation and have continually and openly occupied said reservation from

that time until subsequent to the passage of the act of January 14, 1889."

Rec. pp. 12, 13.

Conclusion.

From the above statement of facts it conclusively appears that:

1. The Mille Lac band of Indians understood and believed that by the treaties of 1863 (12 Stat. L., 1249) and 1864 (13 Stat. L., 693) they were reserving to themselves the Mille Lac Reservation as a permanent home to be occupied by them so long as they should not molest the persons or property of the whites.

2. That the Mille Lac band of Chippewa Indians continued thereafter to occupy such Reservation, with such understanding and belief, and resided thereon, in spite of all opposition and attempted invasion and expulsion, without intermission, until October 5, 1889, and subsequent thereto.

3. On October 5, 1889, after meeting on the reservation daily for four successive days with the Commissioners appointed under the Nelson act, they ceded and relinquished their rights in the other reservations in Minnesota, and relinquished their right of occupancy in the Mille Lac Reservation, believing and understanding and having been informed, that such reservation came under the act of 1889, that it would be classified into "pine lands" and "agricultural lands" and disposed of in the same manner as the other reservations ceded and relinquished by the Chippewas of Minnesota under such act of January 14, 1889, and that the moneys received from such sales would be paid into the United States Treasury for the same purpose as the moneys obtained from the sale of the other reservations, and that

they had the right of allotment upon the Mille Lac Reservation, if they should so elect.

—o—

POINTS AND AUTHORITIES.

I.

Under the Act of February 15, 1909 (35 Stat. L. 619), which reads as follows:

> "That the Court of Claims be, and it is hereby, given jurisdiction to hear and determine a suit or suits to be brought by and on behalf of the Mille Lac band of Chippewa Indians in the State of Minnesota against the United States on account of the losses sustained by them or the Chippewa Indians of Minnesota by reason of the opening of the Mille Lac Reservation in the State of Minnesota, * * * to public settlement under the general land laws of the United States; and from any final judgment or decree of the Court of Claims either party shall have the right to appeal to the Supreme Court of the United States."

Equity jurisdiction is not conferred upon the Court of Claims and hence the findings of the Court of Claims determine all matters of fact precisely as the verdict of a jury.

> Stone v. United States, 164 U. S. 380, 382, 383.
> McClure v. United States, 116 U. S. 145.
> Tillson v. United States, 100 U. S. 43.

Harvey v. United States, 105 U. S. 671.
United States v. Old Settlers, 148 U. S. 427.
LaAbra Silver Mining Co. v. United States, 175 U. S. 423.

II.

The jurisdictional act was correctly interpreted by the Court of Claims.
Rec. pp. 22, 23.

III.

The act gives to the Court of Claims jurisdiction to determine the losses suffered by the Mille Lac band of Chippewa Indians in the State of Minnesota or the Chippewas of Minnesota by reason of the opening of the Mille Lac Reservation in the State of Minnesota to public settlement under the general land laws of the United States.
See act of February 15, 1909. (35 Stat. L., 619).

IV.

By each of the treaties, to-wit, of March 11, 1863, and May 7, 1864, the Mille Lac Reservation was reserved to the Mille Lac band of Chippewa Indians, the appellee herein, as and for an Indian Reservation, to be occupied by them as such so long as they should not in any way interfere with or in any manner molest the persons or property of the whites.

Worcester v. Georgia, 6 Pet. 515.
Mitchell v. United States, 15 Pet. 52.
Leavenworth, etc. R. v. United States, 92 U. S. 733.

Spalding v. Chandler, 160 U. S. 394.
Jones v. Meehan, 175 U. S. 1.
United States v. Choctaw Nation, 179 U. S. 494.
Lone Wolf v. Hitchcock, 187 U. S. 553.
United States v. Winans, 198 U. S. 371.
Cal. & Oreg. Land Co. v. Worden, 85 Fed. R. 94.
Cal. & Oreg. Land Co. v. Rankin, 87 Fed. R. 532.
United States v. Thomas, 151 U. S. 577.
Minnesota v. Hitchcock, 185 U. S. 373.
Act of July 22, 1890 (26 Stat. Ch. 714, p. 290).

V.

The Court will construe the treaties of March 11, 1863, and May 7, 1864, and the instrument by which the Mille Lac band relinquished their right of occupancy of the Mille Lac Reservation in 1889 as the Indians understood such treaties and such instrument.

Worcester v. Georgia, 6 Pet. 515.
United States v. Winans, 198 U. S. 371-380.
Jones v. Meehan, 175 U. S. 1, 11.
Lone Wolf v. Hitchcock, 187 U. S. 553.
Cherokee Intermarriage Cases, 203 U. S. 76, 88-90.
Choctaw Nation v. United States, 119 U. S. 1.

VI.

By the very instrument of cession and relinquishment by the Mille Lacs to the United States on October 5, 1889, thereafter approved by President Harrison, the United States acknowledged the Indian title of the Mille Lac Reservation to be then in the Mille Lac band of Chippewas of Mississippi.

See instrument of cession and relinquishment, Finding IX, Rec. p. 15.

White v. Wright, 83 Minn. 222.
Act of July 22, 1890 (26 Stat. Ch. 714, p. 290).

VII.

The relinquishment of the Mille Lac Reservation was obtained from the Mille Lacs with the understanding and belief on their part that such reservation would be classified into pine lands and agricultural lands, the pine lands estimated and sold, and, after allotments of the agricultural lands were made, the remaining agricultural lands would be sold to actual settlers and the moneys received from both paid into the United States Treasury under and in accordance with the provisions of said act of January 14, 1889.

Instrument of Cession, Finding IX, Rec. p. 15.
Finding IX, Rec. pp. 14-16.
Act of January 14, 1889.

VIII.

The cessions and relinquishments of the Chippewa Indians of Minnesota of their various reservations in Minnesota under the act of January 14, 1889, including the cession and relinquishment by the Mille Lac band of Chippewas and its relinquishment of the Mille Lac Reservation, was a cession and relinquishment of each of said Reservations to the United States in trust, which trust is expressed in the provisions of the act of January 14, 1889.

Minnesota v. Hitchcock, 185 U. S. 373, 394.

IX.

The failure of the United States to carry out the provisions of the act of January 14, 1889, and the adoption by Congress of the Joint Resolution of December 19, 1893, (28 Stat. L., 576), confirming certain entries made upon the Mille Lac Reservation mentioned in said resolution, constituted such a failure of duty on the part of the United States as gives the Mille Lac band a right of action against the United States for damages under the jurisdictional act.

United States v. Blackfeather, 155 U. S. 180.
Choctaw Nation v. United States, 119 U. S. 1.
Lone Wolf v. Hitchcock, 187 U. S. 553, 564, 567.
United States v. Carpenter, 111 U. S. 347.
Spalding v. Chandler, 160 U. S. 404.

X.

The measure of damages for the opening up of such reservation to settlement under the public land laws is the reasonable value of the pine timber and agricultural lands on such reservation on December 19, 1893, with interest thereon at the rate of five per cent. from such date.

United States v. Blackfeather, 155 U. S. 180.
United States v. Old Settlers, 148 U. S. 427.
United States v. Cherokee Nation, 202 U. S. 101.
Act of January 14, 1889 (25 Stat. L., 642).

XI.

The passage of the Joint Resolution of December 19, 1893, (28 Stat. L., 576), and the passage of the Joint Resolution of May 27, 1898 (30 Stat. L., 745), do not indicate

any intention on the part of Congress to confiscate the Mille Lac Reservation, nor that in the exercise of its plenary power Congress intended to take from the Chippewas of Minnesota the value of such reservation.

Lone Wolf v. Hitchcock, 187 U. S. 553.
Cherokee Nation v. Hitchcock, 187 U. S. 294.
Act of February 15, 1909 (35 Stat. L., 619).

XII.

Certainly Congress, with the consent of all the several bands of Indians, had the right to pool the interests of all the Chippewa Indians of Minnesota, classify and sell their lands and divide the proceeds among them as provided by the act of January 14, 1889.

XIII.

The judgment of the Court of Claims should be affirmed.

ARGUMENT.

The ultimate question on this appeal, in the opinion of counsel for appellee, is whether the findings of fact of the Court of Claims are sufficient to warrant the conclusion of law based thereon and the judgment following.

Nevertheless, in view of the contention of the appellant, the assignment of errors by counsel and the propositions in their brief, we submit the following propositions in reply.

I.

UNDER THE ACT OF FEBRUARY 15, 1909 (35 STAT. L., 619) WHICH READS AS FOLLOWS:

"THAT THE COURT OF CLAIMS BE, AND IT IS HEREBY GIVEN JURISDICTION TO HEAR AND DETERMINE A SUIT OR SUITS TO BE BROUGHT BY AND ON BEHALF OF THE MILLE LAC BAND OF CHIPPEWA INDIANS IN THE STATE OF MINNESOTA AGAINST THE UNITED STATES ON ACCOUNT OF THE LOSSES SUSTAINED BY THEM OR THE CHIPPEWAS OF MINNESOTA BY REASON OF THE OPENING OF THE MILLE LAC RESERVATION IN THE STATE OF MINNESOTA, * * * TO PUBLIC SETTLEMENT UNDER THE GENERAL LAND LAWS OF THE UNITED STATES; AND FROM ANY FINAL JUDGMENT OR DECREE OF THE COURT OF CLAIMS EITHER PARTY SHALL HAVE THE RIGHT TO APPEAL TO THE SUPREME COURT OF THE UNITED STATES."

EQUITY JURISDICTION IS NOT CONFERRED UPON THE COURT OF CLAIMS, AND HENCE THE FINDINGS OF THE COURT OF CLAIMS DETERMINE ALL MATTERS OF FACT PRECISELY AS THE VERDICT OF A JURY."

THE DISSENTING OPINIONS.

The record contains the dissenting opinions of Chief Justice Peelle and Judge Howry. In their statement of facts counsel have frequently referred to the statement of facts given by Judge Howry in his opinion to contradict the Findings of the Court of Claims, and have done the same in their argument.

Counsel also have gone outside the Record in their statement of facts and have, in effect, asked this Court to make Findings upon such statement of facts by counsel.

We protest against such use of the dissenting opinions, and going outside the record.

The Findings of the Court of Claims determine all matters of fact precisely as the verdict of a jury, and we feel warranted in contending that counsel must confine them-

selves in their statement of facts to the Findings of the Court of Claims.

McClure v. United States, *supra*, was a motion to order up evidence from the Court of Claims accompanied by an alternative motion to order that Court to make specific findings of fact.

Such suit was brought in the Court of Claims under a special act of Congress passed February 24, 1874, which among other things provided: "That the claims of Daniel McClure, assistant paymaster general, for credits on differences in his account as paymaster, under his official bond, dated March 2, 1859, shall be and are hereby referred to the Court of Claims with jurisdiction to hear and determine said claims. And if the said Court shall be satisfied from the evidence that any of the moneys charged to him were in fact received by him, or that other just and equitable grounds exist for credits claimed by him, it shall make a decree setting forth the amount to which the said McClure shall be entitled to receive credit. * * * (18 Stat., 531.)"

Held, that such act of Congress conferred no equity jurisdiction upon the Court of Claims but only the ordinary jurisdiction of the subject as a court of law, subject to be proceeded with as in ordinary suits, and subject to the rules regulating appeals in ordinary judgments. Hence the motion to order up the evidence from the Court of Claims was denied.

To the same effect was Tillson v. United States, 100 U. S., 43:

> "Where the court was authorized and directed 'to * * * ascertain, determine and adjudge the amounts equitably due said firm, if any, for such loss or damage' this court decided that the reference

> was made to the court as a court and not to the judges as arbitrators and that the word 'equitably' as there used meant no more than the rules of law applicable to the case should be construed liberally in favor of the claimants."

The other cases cited, except the 160 U. S., are examples of where this Court held that the special acts conferred equity jurisdiction upon the Court of Claims.

Counsel for appellee contend that, in this case, "the findings of the Court of Claims determine all matters of fact precisely as the verdict of a jury."

And as said by this Court in Stone v. United States, 164 U. S., 380,383, this Court "is not at liberty to refer to the opinion for the purpose of eking out, controlling or modifying the scope of the findings."

This was said in reference to the opinion of the Court; much more would it be true of dissenting opinions.

We shall endeavor to discuss and meet the assignment of errors by appellant and the propositions argued by counsel under the following propositions:

II.

THE JURISDICTIONAL ACT WAS CORRECTLY INTERPRETED BY THE COURT OF CLAIMS.

Judge Booth speaking for the Court of Claims on pages 22 and 23 of the Record said:

> "The jurisdictional statute refers a claim; it determines no rights other than the one to litigate; provides a forum with authority to ascertain, adjudicate, and enforce rights. The question of damages alleged to have been suffered by claimant Indians must be

determined by the court upon the same legal principles as appertain to controversies between individuals, and while it defines the nature of the cause of action and recognizes the justice of its determination, it extends no further as respects the merits of the issue (Stewart v. United States, 206 U. S., 185).

"The jurisdiction of the court is challenged by the defendants. The contention is the plenary authority of Congress over Indian tribes and tribal property. The question of Indian policy is a political one, immune from the action of the courts. (Cherokee Nation v. Hitchcock, 187 U. S., 294; Lone Wolf v. Hitchcock, 187 U. S., 553.) The court recognizes the force of the decisions cited, and if this case came within them would dismiss it immediately. We are not dealing with acts regulating the administration of Indian property and Indian funds in the sense of their validity or invalidity. The question at issue rests upon the construction of treaties and acts of Congress and rights acquired thereunder. The authority of Congress in the premises is not questioned. The jurisdiction conferred extends to an inquiry as to what if any damages the claimants suffered by reason of an alleged taking of their property acquired under treaties which failed of execution because of acts of Congress. It is a warrant of authority to adjudicate results and not determine the means employed to bring about the same. In Cherokee Nation v. Hitchcock, *supra*, the court said: 'There is no question involved in this case as to the taking of property; the authority which it is proposed to exercise, by virtue of the act of 1898, has relation merely to the control and development of the tribal property, which still remains sub-

ject to the administrative control of the Government, even though the members of the tribe have been invested with the status of citizenship under recent legislation.' Lone Wolf vs. Hitchcock, followed the Cherokee case, *supra*, and the court therein was dealing with administrative measures designed to control Indian property, a mere change in the form of investment of Indian tribal property."

We can not believe that such holding of the Court of Claims was error.

It can not be that Congress would have passed the jurisdictional act if such act was meaningless. Certainly Congress had some object and purpose in passing the act. And counsel for appellee believe that this act, taken in connection with the Joint Resolution of December 19, 1893, and the Joint Resolution of 1898, negatives any intention on the part of Congress in such resolutions to take from the Indians of Minnesota the value of the Mille Lac Reservation.

III.

THE JURISDICTIONAL ACT GIVES TO THE COURT OF CLAIMS JURISDICTION TO DETERMINE THE LOSSES SUFFERED BY THE MILLE LAC BAND OF CHIPPEWA INDIANS IN THE STATE OF MINNESOTA OR OF THE CHIPPEWAS OF MINNESOTA, BY REASON OF THE OPENING OF THE MILLE LAC RESERVATION TO PUBLIC SETTLEMENT UNDER THE GENERAL LAND LAWS OF THE UNITED STATES.

The contention of appellee is:

The Mille Lac band, the claimant, had a reservation, the Mille Lac Reservation; that claimant relinquished such reservation to the United States in trust under the Nelson

act; by the terms of the Nelson act, as explained and interpreted to the claimant by the Commissioners, and as understood by the claimant, such reservation was to be classified into pine and agricultural lands; the pine lands estimated and sold, the agricultural lands allotted, and the remainder, if any, of the agricultural land, after the allotments were made, sold, or, in case of no allotments, all the agricultural lands to be sold to actual settlers as provided in the act, and the moneys disposed of as provided therein.

That the United States failed in executing the trust; that, recognizing such failure on the part of the Government, Congress passed the jurisdictional act giving the Court of Claims authority to determine the losses suffered on account of the failure of the trust.

Appellant contends: That claimant had no reservation; or if so, it had been abandoned; that there was no trust agreement; or if so, it has been executed; that there were no losses; or if so, they have been paid; therefore, there was no claim, and, hence, there was referred to the Court of Claims no claim, or at most a claim to determine the value of the naked right of occupancy.

This is a strange contention.

Suppose Congress had opened up any other of the nine Chippewa Reservations of which a cession and relinquishment were obtained under the Nelson act, and had passed a statute precisely like the jurisdictional act in the instant case. Would counsel then contend, that since Congress in the exercise of its plenary power had opened up such reservation to public settlement under the general land laws, therefore the intention of Congress was to confiscate such reservation?

That is what such contention ultimately means.

In the case of United States v. Choctaw Nation, cited to sustain contention of counsel, to the jurisdictional act therein was attached the following proviso:

> "And provided further, that nothing in this act shall be accepted or considered as a confession that the United States admits that the Choctaw and Chickasaw Nations have any claim to, or interest in, said lands or any part thereof."

There is no proviso in the act of February 15, 1909. But this Court will interpret for itself the jurisdictional act in view of the conditions and circumstances which led to its passage.

IV.

BY EACH OF THE TREATIES, TO-WIT, OF MARCH 11, 1863, AND MAY 7, 1864, THE MILLE LAC RESERVATION WAS RESERVED TO THE MILLE LAC BAND OF CHIPPEWAS OF THE MISSISSIPPI, THE APPELLEE HEREIN, AS AND FOR AN INDIAN RESERVATION, TO BE OCCUPIED BY THEM AS SUCH AS LONG AS THEY SHOULD NOT IN ANY WAY INTERFERE WITH OR MOLEST THE PERSONS OR PROPERTY OF THE WHITES.

Counsel for appellant say:

> "The Mille Lac Reservation was ceded to the United States by the treaties of 1863 and 1864, and became public land opened to settlement. The Mille Lac band acquired no title thereto, but was permitted to remain thereon temporarily."
>
> Brief of Appellant, p. 33.

"On February 22, 1855, the United States entered into a treaty with the Gull Lake, Mille Lac, Sandy Lake, Pokagomin Lake, Rabbit Lake and Rice Lake bands of Indians known as the Chippewas of the Mississippi, and the Pillager

and Lake Winnibigoshish bands of Chippewas. This treaty secured to the United States a cession of all the lands belonging to the various bands of Indians mentioned in the State of Minnesota, and set apart for them specific reservations mentioned in the treaty. The Mille Lac Reservation was set apart for the Mille Lac band of Chippewas." (Finding II, Rec. p. 8.)

Prior to August, 1862, the Mille Lac band of Chippewas had rendered a great service to the United States in preventing an uprising of the Chippewas of Minnesota and their joining with the hostile Sioux in an outbreak against the United States." (Finding III, Rec. pp. 8 and 9.)

"In March, 1863, Commissioner Dole, in company with the head-men and chiefs of the Chippewa bands, came to Washington, D. C., and on March 11, 1863, procured their assent to another treaty." (Finding IV, Rec. p. 9.)

This treaty between the Chippewas of the Mississippi and the United States provided in terms for the cession to the United States of the Reservations set apart to them under the treaty of 1855 with certain exceptions, and the following proviso in article 12 of such treaty:

> "It shall not be obligatory upon the Indians parties to this treaty to remove from their present reservations until the United States shall have first complied with the stipulations of articles 4 and 6 of this treaty, when the United States shall furnish them with all necessary transportation and subsistence to their new homes, and subsistence for six months thereafter: Provided, That, owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites."

(Finding IV, Rec. pp. 9, 10.)

On the 7th day of May, 1864, the United States entered into another treaty with the bands of Indians (13 Stat. L., 693), which treaty was substantially the same as the treaty of March 11, 1863, before mentioned.

Article 12 of the treaty of 1864 was exactly the same as article 12 of the treaty of 1863 with the additional proviso as follows:

> "That those of the tribe residing on the Sandy Lake Reservation shall not be removed until the President shall so direct."

The Mille Lac Band were at the time residing upon and occupying the Mille Lac Reservation, which under the treaty of February 22, 1855, had been reserved to the Chippewas of the Mississippi with the five other reservations for the permanent homes of such Chippewas.

And in entering into the treaty of 1863 as well as the treaty of 1864, it was the intention and understanding of the Mille Lac band of Indians that they were only releasing and *ceding* their interest in the other five reservations reserved by the United States to the Mississippi Chippewas in 1855, and that their own reservation, the Mille Lac Reservation, was by the terms of such treaty reserved to them forever as a permanent home, or so long as they did not interfere with the persons or property of the whites.

For some reason the treaty making power, acting on behalf of the United States, was very willing that the Mille Lac band of Indians should not be compelled to remove to the new reservation to which the United States evidently intended to remove all the other Chippewas of the Mississippi.

There had been a recent uprising of the Indians; there might be another. The Government could more easily guard and control, and so prevent, a second uprising by segregating these Indians on one reservation.

The Government had no fear of the Mille Lac Indians, they had given conclusive evidence of their loyalty to the United States, and had prevented one uprising.

What more natural then than that the United States should leave these Indian friends on a reservation nearer to the center of population and segregate all the other Chippewa Indians on a reservation much farther removed? By doing this the Mille Lac Indians would act as scouts for the United States.

If history can be relied upon, that was the real intent of the United States in leaving the Mille Lacs upon their reservation.

But the United States realized that the Mille Lacs were *Indians;* so the proviso which gave them the right to remain in the occupancy of the Mille Lac Reservation was conditioned upon their continued loyalty to the United States expressed in the terms "so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites."

Counsel for appellant suggest that if the United States had intended by this proviso that such occupancy was to be anything more than a mere license, the commissioners would have expressed it in a different manner, and instances the case of the Commissioners who made the treaty reserving a section to one of the chiefs, and says: "An express exception excludes all others."

Would counsel contend that the Indians were supposed to understand such technical rules of law and that they would probably be able to apply these rules as counsel does here?

This strikes us as being altogether too technical to consider in construing the treaty made with the Indians.

Again, counsel say, the privilege is merely, "not to be compelled to remove."

That means what? Simply that they may occupy.

They were in the occupation of a reservation reserved to them for a permanent home.

A tenant is in the occupation of a house. The landlord writes to him, "you shall not be compelled to remove for ten years." Is that an extension of the lease? Does that mean the tenant can only occupy a part of the house, one or two rooms?

A tenant is in the occupation of a farm consisting of ten thousand acres, the landlord writes him, "you shall not be compelled to remove from the farm for the next ten years, if you will not allow mustard to grow on the west thousand acres of the farm." Would that be an extension of the lease of the farm? Would that continue the tenant in the exclusive occupancy of the farm so long as he observed the conditions?

These Mille Lac Indians, according to the Findings of the Court of Claims, had been in the exclusive occupation of the Mille Lac Reservation from the year 1855.

Giving the natural meaning to the language used as the Indians would understand it, what would the words mean?

"Not be compelled to remove." From where? From the Mille Lac Reservation. The other five reservations had been ceded to the United States, and not one of them is ever heard of as a reservation thereafter. But the Mille Lac Reservation in all public documents, in all reports, even in the Document 247, is referred to as the Mille Lac Reservation." Counsel for appellant on page 20 of their brief unconsciously have referred to it as a "reservation." For,

they say: "the quantity of land in all of the Chippewa Reservations in said state aggregating 4,747,931 acres."

Those figures include the Mille Lac Reservation, which, as we have seen in our statement of facts, found on page 28 of Executive Document 247, under the heading:

"Schedule showing the number of acres in the Chippewa Reservation in the State of Minnesota,"

is found among such reservations. The sixth in the schedule is "Mille Lac, 61,014 acres."

As we have seen, the Court of Claims have found what the understanding and belief of the Mille Lac Indians was in reference to the reservation.

> "At the time of the execution of the treaty of 1863 and 1864, by the Mille Lac Indians, the said band of Indians understood and believed that they were reserving to themselves the right to occupy the Mille Lac Reservation set apart to them by the treaty of 1855."
>
> (Finding VI, Rec. p. 11.)

The Court of Claims had all the various documents and records at their disposal, they examined and weighed the evidence and that is their finding.

We say that finding determines the fact precisely as the verdict of a jury.

But counsel contend this was only a "right of occupancy." We say that "the right of occupancy" was the only title to land that such Indians have held within the domain of the United States since the beginning of the Nation.

In the case of Jones v. Meehan, 175 U. S., 1, Mr. Justice Gray speaking for the Court, on page 8, said:

> "Undoubtedly, the right of the Indian nations or tribes as to their lands within the United States was a right of possession or occupancy only; the ultimate title in fee in those lands was in the United States; and the Indian title could not be conveyed by the Indians to anyone but the United States without the consent of the United States."

In Leavenworth, L. & G. R. Co. v. United States, 92 U. S., 733, the late Mr. Justice Davis speaking for the Court, on page 742, said:

> "As long ago as the Cherokee Nation v. Georgia, 5 Pet. 1, this court said, that the Indians are acknowledged to have the unquestionable right to the lands they occupy, until it shall be extinguished by a voluntary cession to the Government; and recently in United States v. Cook, 19 Wall., 591, that right was declared to be as sacred as the title of the United States to the fee."

In the case of Spalding v. Chandler, 160 U. S., 394, Mr. Justice White, now Chief Justice White, speaking for the court on page 402, said:

> "It has been settled by repeated adjudications of this court that the fee of the lands in this country in the original occupation of the Indian tribes was from the time of the formation of this government vested in the United States. The Indian title as against the United States was merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they saw fit until such right of occupation had been surrendered to the Government. When the Indian reser-

vations were created, either by treaty or Executive order, the Indians held the land by the same character of title, to-wit, the right to possess and occupy the lands for the uses and purposes designated."

To the same effect are all the cases quoted from this court.

The case of Cal. & Oreg. Land Co. v. Worden, 85 Fed. R. 94, is almost on all fours with the case at bar. In that case, we quote from the syllabi:

> "Alternate sections were granted by the United States to aid in the construction of a military road, the route of which lay through Indian country. Afterwards, by treaty, the Indians ceded to the Government a large region described by metes and bounds. Following the words of cession was a proviso that 'the following described tract, within the country ceded by this treaty,' shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians, and held and regarded as an Indian reservation.
>
> "*Held*, that this was not a cession and recession of the reserved lands, but a mere reservation to the Indians of the same title and right that they originally had, and hence that the military road grantees acquired no better right in sections falling within the reservation than they had before; so that a subsequent allotment of lands in severalty to certain of the Indians, pursuant to the treaty, was no infringement of its rights."

This case was subsequently affirmed on a motion for rehearing before the Circuit Court. See Cal. & Oreg. Land Co. v. Rankin, 87 Fed. R., 532.

So in the instant case, while, to be sure, the Mille Lac band did not, under the treaty of 1855, separately own the Mille Lac reservation they had a right in common to such reservation and to five other reservations ceded under the treaty of 1855 with the other five bands of the Chippewas of the Mississippi.

But all the six bands of the Chippewas of the Mississippi did own the Mille Lac reservation, and the five other reservations. And the six bands of the Chippewas of the Mississippi were all parties to the treaties of 1863 and 1864, and so it may truly be said that the proviso to article 12 was a reservation by all the six bands of the Mississippi to the Mille Lac band alone of the right of occupancy, as held in the case just cited.

In the case of United States v. Winans, 198 U. S., 371, Mr. Justice McKenna, speaking for the Court, on Page 381, said:

> "The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them,—a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose."

How true of the instant case. The Chippewas of the Mississippi owned six reservations. They ceded to the

United States five of them absolutely. By proviso to article 12 the Chippewas of the Mississippi reserved to the Mille Lac band, with the consent of the United States, the Indian title to such reservation so long as they should not interfere with the persons or property of the whites. The consideration for the consent of the United States to this reservation was two-fold. First, it was the "heretofore good conduct" of the Mille Lacs, viz., that of preventing an uprising of the Chippewas and their joining with the Sioux and thus causing an Indian war, and, Second, the continuance of this good conduct by not interfering with the persons or property of the whites.

The Mille Lacs have not violated the second condition. They had not violated it at the time of the cession and relinquishment on October 5, 1889. Surely, the Indian title to the Mille Lac reservation was in them, remained in them until they parted with it by cession and relinquishment.

So we say, the treaties of 1863 and 1864 can not be construed as the granting of a right by the United States to the Mille Lac band of Indians. On the contrary, a proper construction of each treaty is the granting of certain rights by the Mille Lac band and the other five bands of the Chippewas of the Mississippi to the United States, reserving, however, to the Mille Lac band, with the consent of the United States, the right of occupancy of the Mille Lac reservation. That this is true is seen by the very instrument of cession in 1889 which was prepared by the United States Government itself and furnished to the commissioners under the direction of the Secretary of the Interior.

Turning to the instrument of cession, Finding IX., Rec. p. 15, we read:

> "And we do also hereby forever relinquish to the United States the right of occupancy on the Mille

> Lac Reservation, *reserved* to us by the 12th article of the treaty of May 7, 1864."

Presumably, and as a matter of fact, this instrument of cession and relinquishment was prepared by the United States Government, not by the Mille Lacs.

By the very terms then of this instrument it is conceded that this reservation was reserved to the Mille Lac band by the 12th article of the treaty of May 7th.

Again, attention is called to the beginning of the instrument, viz.:

> "We, the undersigned, being male adult Indians over 18 years of age, of the Mille Lac Band of Chippewas of the Mississippi, *occupying and belonging to the Mille Lac Reservation under and by virtue of a clause in the Twelfth Article of the treaty of May 7*, 1864 (13 Stat., p. 693), do hereby certify and declare that we have heard, read, interpreted, and thoroughly explained to our understanding the act of Congress approved January 14, 1889, entitled '*An act for the relief and civilization of the Chippewa Indians in the State of Minnesota.*'"

So it is seen that in the very instrument prepared by United States Commissioners these Indians were admitted to be occupying and belonging to the Mille Lac Reservation reserved to them under and by virtue of a clause in the 12th article of the treaty of May 7, 1864.

Can there be any doubt that by the treaties of 1863 and 1864 the Mille Lac Reservation was reserved as an Indian Reservation to the Mille Lac Band of Chippewas of the Mississippi so long as they should not in any way interfere with or molest the persons or property of the whites? They

had not forfeited such right of possession at the time they made the cession and relinquishment.

Counsel argue, in effect, that there was not a sufficient consideration passed to the United States for reserving to the Mille Lacs of the Mille Lac Reservation.

But the United States in 1863 and 1864 thought differently. The Commissioners who framed the treaty probably understood better the conditions and the value of the service than counsel do today. Such consideration was deemed sufficient and was declared in the treaty to be the consideration for the proviso, in connection with the continuation of the same kind of conduct.

Now, much is attempted to be made out of the question who were "the whites" referred to in the proviso. The Court of Claims in their opinion have discussed that phase of the subject very thoroughly (Rec. pp. 25-27), and we adopt the argument expressed by Judge Booth in the opinion of the Court as our own.

Counsel suggest that there were two objects to be accomplished by the treaties of 1863 and 1864:

1. The benefit to the Indians, and

2. The opening up of the lands to public settlement for the benefit of the whites.

The treaties of 1863 and 1864 were real treaties.

The Indians were persuaded to make those treaties with the Government, and understood that they were parties to the treaties.

We presume the first proposition was for the Government to get the land. Suppose we look simply to that part of the treaty which pertains to the lands of the Mississippi Chippewas.

The Mississippi Chippewas had at that time reserved to them six reservations for permanent homes.

The United States proposed that the Indians cede these back in consideration of a new reservation upon which all of the bands of Chippewas of the Mississippi could live together in one compact body.

The Indians were perfectly willing to cede five of the reservations, but when it came to ceding the Mille Lac Reservation, presumably the Mille Lacs objected. There was a halt in the proceedings. It may be that all six bands objected to moving. Apparently the Commissioners were deaf to the entreaties of the five other bands, but when it came to the Mille Lac band they looked at it from a different point of view. The Mille Lacs had performed a loyal service for the Government in preventing an Indian war. On this account the Government were willing to allow the Mille Lac band to remain in the occupation of the Mille Lac Reservation so long as they should continue such loyalty to the United States, and so by each of said treaties of 1863 and 1864, as said in our statement of facts, all of said six reservations, so reserved and set apart for the Chippewas of the Mississippi under the treaty of 1855, except the Mille Lac Reservation, were ceded back to the United States.

By each of these two treaties, the Gull Lake, Sandy Lake, Rabbit Lake, Pokagomin Lake and Rice Lake bands of Chippewas of Mississippi, with the consent, and at the suggestion, of the United States, in effect, ceded all their right and interest in the Mille Lac Reservation to the Mille Lac band. Such Mille Lac Reservation was, therefore, by the terms of each of such treaties, *reserved* to the Mille Lac band and made the separate and sole property of the Mille Lac band, to be occupied by such band as an Indian Reservation so long as the Mille Lac band of Indians in no way interfered with the persons or property of the whites.

We think then it clearly appears that the second proposition of the appellants (appellants' brief, p. 33) and the

2nd, 3rd and 5th errors assigned are at least answered in part.

V.

THE COURT WILL CONSTRUE THE TREATIES OF MARCH 11, 1863, AND MAY 7, 1864, AND THE INSTRUMENT BY WHICH THE MILLE LAC BAND RELINQUISHED THEIR RIGHT OF OCCUPANCY OF THE MILLE LAC RESERVATION AS THE INDIANS UNDERSTOOD SUCH TREATIES AND SUCH INSTRUMENT.

As said in reference to the preceding proposition, we again say here:

> "At the time of the execution of the treaty of 1863 and 1864 by the Mille Lac Indians the said band of Indians understood and believed that they were reserving to themselves the right to occupy the Mille Lac Reservation set apart to them by the treaty of 1855."
>
> (Finding VI, Rec. p. 11.)

In the case of United States v. Winans, 198 U. S., 370, on page 380, Mr. Justice McKenna, speaking for the Court, said:

> "And we have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection' and counterpoise the inequality by the superior justice, which looks only to the substance of the right without regard to technical rules. (Choctaw Nation v. United States,

119 U. S., 1.) (Jones v. Meehan, 175 U. S., 1.) How the treaty in question was understood may be gathered from the circumstances."

In Jones v. Meehan, 175 U. S., 1, Mr. Justice Gray, speaking for the Court on pages 10 and 11, said:

> "In construing any treaty between the United States and an Indian tribe, it must always * * * be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language, and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

The Instrument of relinquishment by which the Mille Lac band relinquished to the United States their right of occupancy to the Mille Lac Reservation is found in Finding IX, Rec. pp. 15, 16.

The Court of Claims in Finding VI, found:

"On October 2, 1889, a council of the Mille Lac Indians assembled on the reservation set apart to them by the treaty of 1855, was addressed by Senator Henry M. Rice, one of the commissioners who participated in the procurement and execution of the treaty of 1863, who told the Indians that he knew that it was understood by them that they were reserving their reservation, that he so understood the meaning of the treaty and assisted in its negotiations with that intent. At the same time and place the chiefs and headmen of the Mille Lac Indians insisted and openly proclaimed that such was their intention in the execution of said treaty"

Rec. p. 11.

And in Finding IX, the Court of Claims found (referring to the act of January 14, 1889):

"This act further provided for the appointment of commissioners to negotiate with the Chippewa Indians in Minnesota for the cession of their reservations, and in compliance therewith the commissioners so appointed held councils with the Mille Lac Indians on their reservation, occupied by them since the treaty of 1855, represented to them that they came within the terms of the act of 1889, and by virtue of said representation secured their assent and a written relinquishment of their reservation as contemplated by the act."

Rec. p. 15.

The Court of Claims, speaking through Judge Booth, Rec. p. 24, said:

"In construing Indian treaties ambiguities and doubtful clauses should be construed in favor of the Indians. This rule is ancient and elementary. It is predicated upon the disparity in intelligence between the contracting parties, the lack of a comprehensive written language for the Indian, and the innumerable and manifest opportunities to misinterpret the meaning of treaty stipulations. The intention and understanding of the Indian tribe of the rights secured to them by conventions of this character is of paramount importance and councils at which they were ratified and confirmed are admissible in evidence to this end. They are not to be construed according to the technical meaning of the words employed, but in that generous and comprehensive manner which justice exacts in dealings between a strong and intelligent party on the one side and an illiterate and inferior party on the other. (Worcester v. Georgia, 6 Pet., 515; Choctaw Nation v. United States, 119 U. S., 1; Jones v. Meehan, *supra*, United States v. Winans, *supra*)."

The very instrument of cession and relinquishment begins as follows:

We, the undersigned, being male adult Indians over 18 years of age of the Mille Lac band of Chippewas of the Mississippi, occupying and belonging to the Mille Lac Reservation under and by virtue of a clause in the 12th article of the treaty of May 7, 1864, etc."

Rec. p. 15.

It will be admitted that this instrument was prepared by the United States Government through the Interior Department and the Commissioners.

Then the United States by the very instrument by which it obtained the relinquishment of the right of occupation of the Mille Lac Reservation, admits that the instrument was executed by the 189 adult Mille Lacs who signed it as Mille Lacs who belonged to and occupied the Mille Lac Reservation.

Under the proposition we are now discussing we shall also discuss the contention of appellant found on page 43, where counsel say:

> "The lands on the Mille Lac tracts were not, therefore, to be sold under the Nelson Act. According to the terms of section 4, it was only lands which were *ceded* to the United States which were to be surveyed and sold. This land was not ceded nor was there any need for its cession."

Peelle, Ch. J., and Howry, J., in their dissenting opinions each made the same contention. Referring to this contention the Court of Claims, speaking through Judge Booth, say on page 34, Rec.:

> "The technical language used in the written instrument subsequent to claimants' assent to the act of January 14, 1889, is cited as indicating a difference in title as to claimant Indians. The use of the word 'relinquish' when speaking of the Mille Lac Reservation as distinguished from the word 'cede' when referring to the White Earth and Red Lake Reservations, can hardly be relied upon in the determination of Indian title. The words are frequently used in Indian treaties conjunctively, and insofar as they affect the conveyance of Indian title

the employment of either word would effectively divest the Indians of their right of occupancy. It is quite true that to the trained lawyer they have a distinct technical significance, but are so nearly synonymous that even they employ them carelessly. In construing Indian treaties their technical significance vanishes."

"In Worcester v. United States (6 Pet., 236), Chief Justice Marshall, in language so directly applicable to this case that we cite it in full, said: 'It is reasonable to suppose that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish the word "allotted" from the words "Marked out." The actual subject of contract was the dividing line between the two nations, and their attention may very well be supposed to have been confirmed to that subject. When in fact they were ceding lands to the United States and describing the extent of their cession, it may very well be supposed that they might not understand the term employed as indicating that instead of granting they were receiving lands. If the term would admit of no other signification, which is not conceded, its being misunderstood is so apparent, results so necessarily from the whole transaction that it must, we think, be taken in the sense in which it was most obviously used.' The rule established by this case has been followed by the Supreme Court in construing Indian treaties ever since."

The Century Dictionary gives the following definitions of "Relinquish":

1.—To give up the possession or occupancy of; withdraw from; leave; abandon; quit.

2.—To cease from; give up pursuit or practice of; desist from.

3.—To renounce a claim to; resign.

Synonyms: Abandon, desert, let go, yield, cede, surrender, give up, lay down.

The same author defines "Cede" as follows:

1.—To yield; give away, submit. To pass; to be transferred.

2.—To yield or formally resign and surrender to another; relinquish, transfer; give up; make over.

It is thus seen that there is no difference primarily in the meaning of the two words, and it is idle to claim that Congress, through its commissioners, intended to take advantage of this illiterate band of Indians by using two terms like "relinquish" and "cede" in a technical way, and in accordance with the technical use of those words interpret a statute to those Indians.

The free use of the word "relinquish" for the word "cede" is illustrated in the dissenting opinion of Judge Howry, where, on page 51, he says:

> "Stipulation permitting the small number of Mille Lacs to remain on lands (which for a consideration the band had just *relinquished* to the United States) was not a recession of such title as the band had before."

What the distinguished jurist meant was that, speaking technically, "the band had just *ceded* to the United States."

The Indians understood by the treaties of 1863 and 1864 that they were reserving to themselves the Mille Lac Reservation to be occupied by them so long as they should not interfere with the persons or property of the whites. In other words, they understood that the Mille Lac Reservation

was to be their permanent home so long as they did not commit acts of violence against the persons or property of the neighboring whites.

VI.

BY THE VERY INSTRUMENT OF CESSION AND RELINQUISHMENT BY THE MILLE LACS TO THE UNITED STATES ON OCTOBER 5, 1889, AND THEREAFTER APPROVED BY PRESIDENT HARRISON, THE UNITED STATES ACKNOWLEDGED AND CONFIRMED THE INDIAN TITLE OF THE MILLE LAC RESERVATION TO BE THEN IN THE MILLE LAC BAND OF CHIPPEWAS OF MISSISSIPPI.

The instrument of cession, as we have previously stated, is found in Finding IX, Rec. p. 15, and we quote the following part thereof, which is sufficient for our purpose:

> "We, the undersigned, being male adult Indians over 18 years of age, of the Mille Lac band of Chippewas of the Mississippi, occupying and belonging to the Mille Lac Reservation under and by virtue of a clause in the 12th article of the treaty of May 7, 1864 (13 Stat., 693), do hereby certify and declare that we have heard read, interpreted, and thoroughly explained to our understanding the act of Congress approved January 14, 1889, entitled 'an act for the relief and civilization of the Chippewa Indians in the state of Minesota * * *' which said act is embodied in the foregoing instrument, and after such explanation and understanding have consented and agreed to said act, and have accepted and ratified the same, and do hereby accept and consent to and ratify the said act and each and all of the provisions thereof, and do hereby grant, cede, relinquish and convey to the United States all our right,

title and interest in and to all and so much of the White Earth Reservation * * * for the purposes and upon the terms stated in said act; and we do also hereby cede and relinquish to the United States all our right, title and interest in and to all and so much of Red Lake Reservation * * * and we do also hereby forever relinquish to the United States the right of occupancy on the Mille Lac Reservation, reserved to us by the 12th article of the treaty of May 7, 1864. (13 Stat., p. 693.)

"Witness our hands and seals hereto subscribed and affixed at Mille Lac in the state of Minnesota, this 5th day of October, 1889.

Henry M. Rice,
Joseph R. Whiting,
Commissioners."

"Then follow the signatures of 189 adult Indians. Said agreement was approved by President Harrison on March 4, 1890."

Rec. pp. 15, 16.

The Court of Claims found as follows:

"At the time of the execution of the treaty of 1863 and 1864, by the Mille Lac Indians the said band of Indians understood and believed that they were reserving to themselves the right to occupy the Mille Lac Reservation set apart to them by the treaty of 1855."

(Finding VI. Rec. p. 11.)

"That the said Mille Lac Indians have, without exception, upon all occasions and in connection with all controversies relating to the title they possessed

to the reservation set apart to them by the treaty of 1855, proclaimed and persisted in their claim of the right of occupancy to said reservation and have continually and openly occupied said reservation from that time until subsequent to the passage of the act of January 14, 1889."

(Finding VI. Rec. pp. 12, 13.)

"On January 14, 1889, Congress passed an act (25 Stat. L., 642), providing for the classification of lands belonging to the Chippewas of Minnesota, into pine lands and agricultural lands and for their sale for the benefit of all Indians in the state of Minnesota, the proceeds arising therefrom to constitute a permanent fund from which annuities would accrue to said Indians for a period of 50 years.

"This act further provided for the appointment of commissioners to negotiate with the Chippewa Indians in Minnesota for the cession of their reservations, and in compliance therewith, the commissioners so appointed held councils with the Mille Lac Indians on their reservation, occupied by them since the treaty of 1855, represented to them that they came within the terms of the act of 1889, and by virtue of said representation secured their assent and a written relinquishment of their reservation as contemplated by the act."

(Finding IX. Rec. p. 15.)

The case of White v. Wright 83 Minn., 22, involved the construction of the act of January 14, 1889. Mr. Justice Collins delivered the opinion of the Court and on page 225 speaking for the court, referring to the Nelson Act he said:

"Its terms were accepted by the Indians and thereupon the President approved the cession and the Indians' title became extinguished. The special provision was made in the law itself for the disposition of the land at public auction under certain restrictions. The proceeds of the sales to be devoted to the use of the Indians. This specified disposition of the lands and of the proceeds amounted to an agreement between the government and its ward and an inhibition upon the sale or disposition of the lands in any other manner. It operated to forbid a disposal of the lands therein mentioned, except in the precise way pointed out by the act. * * * This construction of the Nelson Law is unavoidable, if we are to pay the least attention to its avowed purpose, or to the necessity of keeping faith with the Indians."

The Court of Claims in its opinion, speaking through Judge Booth, said:

"The Department of the Interior, the commissioners appointed by the President to procure the assent of the Indians to the act of January 14, 1889, all treated the Mille Lac Indians as coming within the purview of its provisions. A council extending over several days was held on the Mille Lac Reservation to secure their approval thereto; they were positively and repeatedly assured by the representatives of the Government that they were within its terms; and their written relinquishment of their title to the same, executed by a majority of the tribe residing on the reservation, was secured upon the faith of said representations. Absolutely no doubt existed then as to the scope of the law or its applicability

to claimant Indians. The fact of allowance of homestead entries to the chief of the band and his son argues little. We need not cite authorities to sustain the proposition that the Interior Department is entirely without authority to issue valid patents to Indian lands. (United States v. Carpenter, 111 U. S., 347.) If these patents are at all valid they must rest upon treaty rights or statutory law.

"The Mille Lac Indians were the only band mentioned in the treaties of 1863 and 1864 subsequently asked to relinquish their reservation under the act of January 14, 1889. Surely their status was something different from that of their ancient allies.

"The Congress as late as July 22, 1890, treated the Mille Lac Reservation as Indian lands, for on that date an act was approved granting a railway company a right of way and other privileges through and upon the reservation, expressly reserving to the Mille Lacs in their tribal capacity the damages incident thereto." (26 Stat. L., 290.) Rec. p. 33.

In section 2 of said act of July 22, 1890, referred to by the Court of Claims, *supra*, among other things, it is provided:

"The amount of damage resulting to the Mille Lac Indians in their tribal capacity, by reason of the construction of said railroad, through such lands of the reservation as are not occupied in severalty, shall be ascertained in such manner as the Secretary of the Interior may direct, and be subject to his final approval; but no right of any kind shall vest in said Railway Company in or to any part of the right of way herein provided for until plats thereof, made

upon actual survey for the definite location of such railroad, and including grounds for station, buildings, depots, machine shops, etc., * * * shall have been approved by the Secretary of the Interior, and until the compensation aforesaid shall have been fixed and paid and the consent of the Indians on said reservation to said right of way and as to the amount of compensation shall have been first obtained in a manner as the President may prescribe."

"Provided, that no part of the lands herein authorized to be taken shall be leased or sold by the company, and they shall not be used except in such manner and for such purposes only as shall be necessary for the construction and convenient operation of said railway, telegraph and telephone lines, and when any portion thereof shall cease to be used, such portion shall revert to the nation or tribe of Indians from which the same shall have been taken." (26 Stat. Ch., 714, p. 290.)

In view of these facts and in view of the further fact that the instrument of cession and relinquishment was prepared by the United States and presented to these Indians for their signature with the knowledge, presumably, on the part of the Government, through its commissioners, that it was the understanding and belief of the Mille Lac band when they made the cession and relinquishment of October 5, 1889, to the United States:

1. That all the lands on such reservation would be classified into "pine lands" and "agricultural lands."

2. That the pine timber would be estimated on the pine lands in forty-acre tracts.

3. That after such estimate, the pine lands would be sold, on due notice by publication, at public auction, to the

highest bidder, at not less than three dollars a thousand feet, board measure, of the pine timber estimated to be on such forty-acre tract.

(This was amended later so that the price of white pine was five dollars and Norway pine four dollars a thousand feet.)

4. That the moneys received from such sale of pine lands would be paid into the United States treasury for the benefit of the Mille Lac band, the principal to be held in trust for 50 years, interest to be paid on such principal annually at the rate of 5 per cent per annum, at the end of 50 years the principal to be distributed as provided in such act.

5. That any of the Mille Lacs so desiring would be allotted agricultural lands on such Mille Lac Reservation or the White Earth Reservation, at the election of such Indian.

6. The agricultural lands remaining on such Mille Lac Reservation, after the allotments were completed, to be sold under the homestead laws at not less than a dollar and a quarter an acre. The moneys arising from such sales of agricultural lands to be disposed of in the same way as the money arising from the sale of the pine lands.

We say it clearly appears that by the very instrument of cession and relinquishment the United States acknowledged and confirmed the Indian title of the Mille Lac Reservation to be then in the Mille Lac band of Chippewas of Mississipi. And such relinquishment was obtained upon such representations of the Government.

But the appellants claim that the second proviso to section VI. of such act of January 14, 1889, excluded from the act the Mille Lac Reservation. The provisos are as follows:

> "Provided, that nothing in this act shall be held to authorize the sale or other disposal under its pro-

visions of any tract upon which there is a subsisting, valid pre-emption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the date of its allowance, and if found regular and valid, patents shall issue thereon; provided, that any person who has not heretofore had the benefit of the homestead or pre-emption law, and who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either of said laws, may make a second homestead entry under the provisions of this act."

There were no subsisting, valid pre-emption or homestead entries at the time this cession and relinquishment was made.

The Government itself admitted, through its commissioners, and in the instrument of cession itself, that the Mille Lacs had done nothing at the time to forfeit their right of occupancy of the Mille Lac Reservation. If that were true, then they had the right of occupancy at the time this cession and relinquishment was made.

The Mille Lacs say that they had been told by the commissioners just before signing that the reservation was theirs. That the lands would be sold under the act of January 14, 1889, that they would receive the benefit, that they could have allotments there.

They had the title, as much as Indians hold within the United States, to the Mille Lac Reservation at the time of such cession and relinquishment.

If that be true, then the action of the Interior Department, or of the officers of the Government, in permitting entries to be made by the use of various kinds of scrip

upon these lands in no way affected the rights of the Indians under the treaty of 1863 and 1864.

It does not appear that these provisos were brought to the attention of the Mille Lac Indians.

It will hardly be claimed that this illiterate band of Indians ought to have been of sufficient understanding to have read, with the critical understanding of lawyers, this act of 1889, disregarding the assurance of the commissioners, and have discovered that there had some way crept into this act these provisos which might defeat their right.

Will it be claimed that the Government in face of the title of this "act for the relief and civilization of the Chippewas of Minnesota" would be guilty of deceiving this illiterate band of Indians by putting in such a proviso, which their understanding would not grasp, with the intent to defeat the very provisions of the act itself? That the Government would do this to the band of Indians who had befriended it during the Civil War, that the reservation presented to them by the Government in good faith for their loyalty would be taken from them in such a way and in such a manner seems hardly conceivable.

The purpose and intent of Congress was too lofty and noble to admit that. Though these provisos were in the bill for the purpose of furnishing the lumbermen the means to get hold of this pine timber on this reservation, they would in no way affect the right of the Mille Lacs to the reasonable value of such timber.

We say it does not seem possible that such a contention will obtain in this Court.

Further, by the very provisions of such Nelson act the lands were to be classified into "pine lands" and "agricultural lands."

Section 1 of such act relates to the appointment of the commissioners and the method to obtain the cession and relinquishment.

Section 2 relates to the qualifications of the commissioners.

Section 3 relates to the removal of the Indians to White Earth Reservation, the allotments of lands to the Indians.

Section 4 relates to the examination and classification of lands into pine and agricultural lands.

Section 5 relates to the sale of the pine lands.

Section 6 relates to the sale of the agricultural lands.

These provisos are found under section 6 and must therefore relate to agricultural lands. But these entries, as found by the Court of Claims, were made on pine lands and not agricultural lands, and, therefore, these provisos did not relate to pine lands in any manner.

The Court of Claims in the opinion rendered by Judge Booth discuss this proviso very fully, and we have adopted the views there expressed as our own. See Rec., pp. 30, 31, 32.

On page 33 the Court of Claims say:

> "It is hard to believe that the Government of the United States would by express treaty stipulations grant a right to peaceable, loyal, well-behaved Indians, a right doubly sacred to them, and then in not to exceed seven years from the date of said grant, countenance their ejectment from the lands so granted by a series of fraudulent entries under the general land laws. If the Government intended the Mille Lac Indian Reservation to be open to entry and settlement under the general land laws, it would have so announced, removing all doubt, and doing as is usually done under similar circumstances."
>
> Rec., p. 33.

Appellant's Contention.

Counsel for appellant approach the construction of the Nelson Act from a different viewpoint and one not warranted by the facts.

On page 41 of their brief under Proposition IV they say:

> "At the time the Mille Lac band were in this situation, the large majority of them had already removed to White Earth, but a remnant still lived in primitive Indian fashion on or near the old Mille Lac Reservation."

We have seen that counsel are in error in this statement. On page 42 of their brief counsel for appellant say:

> "In this situation the United States, by the Nelson Act, offered that if all the Indians would remove, some to the White Earth Reservation and the others to the Red Lake Reservation, and would cede to the United States all their lands, such ceded lands would be sold and the proceeds applied to the use of the Indians, and that each Indian would be given an allotment in severalty on White Earth or Red Lake."

Now, that is only a part of the truth, for section 3 of the Nelson Act, which provided for the removal of the Indians to White Earth and Red Lake Reservations concluded with the following proviso, viz.:

> "Provided, further, that any of the Indians residing on any of said reservations may, in his discretion, take his allotment in severalty under this

act on the reservation where he lives at the time of the removal herein provided for is effected, instead of being removed to and taking such allotment on White Earth Reservation."

Continuing on page 42 appellant says:

"This offer was accepted by all the Indians and each band made deeds expressing the acceptance of the provisions of the act, and ceding to the United States the specific reservations which they owned."

"The Mille Lac Band with the others accepted the act, and thereby agreed that the remnant of their band still remaining on or near the old reservation should remove to White Earth."

And here again counsel for appellant are in error. As we have conclusively shown, 895 of the Mille Lac band of Chippewas resided upon and occupied the Mille Lac Reservation when they relinquished their right of occupancy to the United States under the Nelson Act on October 5, 1889. They accepted such act as it had been interpreted and explained to them.

Counsel for appellee contend that it is wholly immaterial how soon after the relinquishment of this Mille Lac Reservation the Mille Lac Indians moved away from it, except as to their right of election to take allotments thereon.

After the relinquishment of the right of occupancy of the Mille Lacs in this Reservation they could take their allotments there, so far as the agricultural land would go, or they could take their allotments on White Earth Reservation or the other Chippewa reservations in the State of Minnesota.

Suppose the Mille Lacs had elected at once upon the relinquishment of their right of occupancy to take their allotments severally on White Earth Reservation? Would such moving away have released the United States from their obligation to carry out the trust agreement, viz., to classify the lands into pine lands and agricultural lands and sell them as provided in such act?

Why, by the very provisions of the act the Indians were expected to move away, unless they chose to exercise their privilege under the proviso to section 3 of such act.

If this be true, then what is the force or value of the argument of counsel that the Mille Lacs had abandoned their reservation subsequent to the act of 1889?

But, we contend that even as late as 1904 the major number of the Mille Lac band still resided on the Mille Lac Reservation. See page 222, Report of the Commission of Indian Affairs for the year 1904, dated September 2, 1904, already referred to in the statement of facts.

VII.

THE RELINQUISHMENT OF THE MILLE LAC RESERVATION WAS OBTAINED FROM THE MILLE LACS WITH THE UNDERSTANDING AND BELIEF ON THEIR PART THAT SUCH RESERVATION WOULD BE CLASSIFIED INTO PINE LANDS AND AGRICULTURAL LANDS, THE PINE LANDS ESTIMATED AND SOLD, AND, AFTER ALLOTMENT OF THE AGRICULTURAL LANDS, THE REMAINING AGRICULTURAL LANDS WOULD BE SOLD, AND THE MONEYS RECEIVED FROM BOTH PAID INTO THE UNITED STATES TREASURY UNDER AND IN ACCORDANCE WITH THE SAID ACT OF JANUARY 14, 1889.

This follows as a corollary to the preceding proposition and the arguments made sustaining such proposition.

VIII.

SUCH CESSION AND RELINQUISHMENT OF THE CHIPPEWA INDIANS OF MINNESOTA OF THEIR VARIOUS RESERVATIONS IN MINNESOTA UNDER THE ACT OF JANUARY 14, 1889, INCLUDING THE CESSION AND RELINQUISHMENT BY THE MILLE LAC BAND OF CHIPPEWAS OF MISSISSIPPI AND ITS RELINQUISHMENT OF THE MILLE LAC RESERVATION WAS A CESSION AND RELINQUISHMENT OF EACH OF SAID RESERVATIONS TO THE UNITED STATES IN TRUST, WHICH TRUST IS EXPRESSED IN THE PROVISIONS OF THE ACT OF JANUARY 14, 1889.

The case of Minnesota v. Hitchcock, 185 U. S., 373, which was a dispute concerning school lands conveyed by the United States to Minnesota, and which lands were within the Red Lake Reservation, called for a construction on the part of this Court of the provisions of the act of January 14, 1889, and on page 394 of that case this Court, speaking through the late Mr. Justice Brewer, said:

> "The act of January 14, 1889, provided for a commission to negotiate for the cession and relinquishment of 'all and so much of' the White Earth and Red Lake reservations as in the judgment of the commission should not be required to satisfy the allotments required by the existing acts, the cession to be 'for the purposes and upon the terms hereinafter stated.' * * * The ceded lands were to be divided into two classes; one appraised and sold at auction and the other disposed of to actual settlers at $1.25 per acre. The proceeds of these sales were to be placed in the Treasury of the United States as a permanent fund to the credit of the

Indians, drawing interest at five per centum for fifty years, the interest to be expended, three-fourths paid in cash to the Indians severally and the remaining one-fourth devoted, under the direction of the Secretary of the Interior, "exclusively to the establishment and maintenance of a system of free schools among said Indians in their midst and for their benefit." *The cession was not to the United States absolutely, but in trust.* It was a cession of all of the unallotted lands. The trust was to be executed by the sale of the ceded lands and a deposit of the proceeds in the Treasury of the United States to the credit of the Indians, such sum to draw interest at five per cent, and one-fourth of the interest to be devoted exclusively to the maintenance of free schools among the Indians and for their benefit."

(The italics are our own.)

It can not be believed that the Mille Lacs alone, the ones who were so loyal to the United States during the civil war, were singled out by the United States as the one band who would not be offered the advantages of the act of 1889, and that their reservation, given to them as a present by the United States, would alone be held as not coming within the purview of the act of January 14, 1889.

Therefore, appellee contends that the Mille Lac reservation was relinquished to the United States in trust.

IX.

THE FAILURE OF THE UNITED STATES TO CARRY OUT THE PROVISIONS OF THE ACT OF JANUARY 14, 1889, THE PASSAGE OF THE JOINT RESOLUTION OF DECEMBER 19, 1893 (28 STAT. L., 576), CONFIRMING A LARGE NUMBER OF

ENTRIES THERETOFORE MADE UPON THE MILLE LAC RESERVATION, AND CONFIRMING TITLE IN SUCH ENTRYMEN, CONSTITUTE SUCH A FAILURE OF DUTY ON THE PART OF THE UNITED STATES AS GIVES THE MILLE LAC BAND A RIGHT OF ACTION AGAINST THE UNITED STATES FOR DAMAGES UNDER THE JURISDICTIONAL ACT.

The case of United States v. Blackfeather, 155 U. S., 180, is a case in some respects similar to the instant case.

The second and principal assignment of error before this Court in that case arose from an allowance of the sum of $260,999.24 based upon a treaty made August 8, 1831, * * * with a branch of the Shawnees residing in Ohio, under which they ceded to the United States their lands in Ohio, the Government agreeing to give in exchange certain lands upon the western side of the Mississippi.

The seventh article of the treaty provided as follows:

> "The United States will expose to public sale to the highest bidder, in the manner of selling the public lands, the tracts of land herein ceded by the said Shawnees, and after deducting from the proceeds of such sale the sum of seventy cents per acre, exclusive of the cost of surveying, the cost of the gristmill, sawmill, and blacksmith shop and the aforesaid sum of thirteen thousand dollars, to be advanced in lieu of improvements; it is agreed that any balance, which may remain of the avails of the lands, after sale as aforesaid, shall constitute a fund for the future necessities of the tribe, parties to this compact, on which the United States agree to pay to the chiefs, for the use and general benefit of their people, annually, five per centum on the amount of said balance, as an annuity. Said fund to be con-

tinued during the pleasure of Congress, unless the chiefs of the said tribe, or band, by and with the consent of their people, in general council assembled, should desire that the fund thus to be created, should be dissolved and paid over to them; in which case the President shall cause the same to be so paid, if in his discretion he shall believe the happiness and prosperity of said tribe would be promoted thereby.

"The court found the total amount ceded under this treaty to have been 96,051.48 acres, and of this amount 9,841.27 acres were sold at public sale to the highest bidder for $20,543.65, or at the rate of $2.08¾ an acre.

"The remainder of the land so ceded was sold at private sale at the rate of $1.25 per acre."

This Court, speaking through Mr. Justice Brown, on page 190, referring to this matter said:

"If it had appeared that the government had 'exposed' these lands to public sale, to the highest bidder, and failing to find a bidder above the statutory price of $1.25 per acre, had then sold them at private sale at that price, its obligation would have been completely discharged. But as there is no evidence that they were ever exposed to public sale, we incline to the view expressed by the Court below that, as between the government and the Indians, there was a failure on the part of the former to observe the stipulation of the treaty and a violation of its trust. The obligation being expressed to expose them to public sale, it was incumbent upon the government to show, either that it had done so and failed to find a bidder, or for some other reason it had been released from

> the provisions of the treaty. The privilege of selling the lands, 'in the manner of selling public lands,' does not nullify the obligation to expose them at public sale, which still remained; but it required them to be sold subject to the conditions and in the manner prescribed by the act of 1820."

It can not be denied that under their plenary power Congress had the right to prescribe the terms and conditions upon which the Commissioners might obtain from the Chippewas of Minnesota the cession and relinquishment of their lands. This includes the right on the part of Congress of incorporating in the statute an agreement on the part of the United States that they would receive such lands in trust and the method and manner of the execution of such trust. In other words, the manner in which the lands should be dealt with after such cession and relinquishment, their classification, the allottments, the estimate, the sale and the distribution of the money. Congress has done this. It has provided in specific terms how the cession and relinquishment should be obtained and what should be done with the lands so relinquished and ceded.

The agreement was made on the part of the Government through three able commissioners appointed by the President. The Indians were represented by their chiefs and headmen.

In the case of Choctaw Nation v. United States, 119 U. S. 1, on page 28, this Court, speaking through the late Mr. Justice Matthews, said:

> "The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while

it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.

"The rules to be applied in the present case are those which govern public treaties, which, even in case of controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations."

In the case of Lone Wolf v. Hitchcock, 187 U. S., 553, this Court, speaking through then Mr. Justice, now Chief Justice White, on page 565, said:

"But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considera-

tions of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians.

"Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. * * *

"The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. * * *"

In United States v. Carpenter, 111 U. S., 347, it was held:

"The location of land scrip upon lands reserved for Indians under the provisions of a treaty with an Indian tribe, and the issue of a patent therefor, are void."

From 1855 until their relinquishment to the United States on the 5th of October, 1889, the Mille Lac band of Chippewas had occupied the Mille Lac reservation under the treaties of 1855, 1863 and 1864.

> "The reservation thus created stood precisely in the same category as other Indian reservations, whether established for general or limited uses, and whether made by the direct authority of Congress in the ratification of a treaty or indirectly through the medium of a duly authorized executive officer."
>
> Spalding v. Chandler, 160 U. S., 404.

Again:

> "Private rights could not, without the authority of Congress, be acquired in the tract during the occupancy of the reservation under the treaty, for the lands in question lost their character as public lands in being set apart or occupied under the treaty, and became exempt from sale and preemption."
>
> *Ib.*, 405, citing Mo. Kans. Tex. Ry. v. Roberts, 152 U. S., 114, 116, 118.

In U. S. vs. Carpenter, *supra*, it is said:

> "The purposes of the treaty could not be defeated by the action of executive officers of the government."

This last is also cited with approval on page 405 of Spalding v. Chandler, *supra*.

Further, there is nothing in the joint resolution of December 19, 1893, that would warrant the Court in holding

that by such resolution Congress, in the exercise of its plenary power, intended to confiscate the Mille Lac reservation. But, on the contrary, in view of the confusion brought about by the varying decisions of the Interior department, there might be a few individuals who had in good faith filed upon some of the agricultural lands in the Mille Lac reservation, and that to protect them Congress would pass such resolution, knowing that it was within its power to compensate the Mille Lac band for any damages which might result to it because of such entries.

In short, nothing but an express declaration by Congress would justify a court in holding that Congress had exercised its plenary power over the property of Indians to the extent of confiscation.

Nevertheless, by the passage of the joint resolution of December 19, 1893, Congress placed it beyond its power to execute its trust in reference to the Mille Lac reservation as provided by the act of January 14, 1889, and hence there was a failure of duty in that regard. Because of that we feel warranted in saying that there was at once a right of action against the United States for damages which only awaited the action of Congress to give its ward authority to sue the United States for such failure of duty.

X.

THE MEASURE OF DAMAGES FOR THE OPENING OF SUCH RESERVATION TO SETTLEMENT UNDER THE PUBLIC LAND LAWS IS THE REASONABLE VALUE OF THE PINE TIMBER AND AGRICULTURAL LANDS ON SUCH RESERVATION ON DECEMBER 19TH, 1893, WITH INTEREST THEREON AT THE RATE OF FIVE PER CENT FROM SUCH DATE.

This was virtually admitted by the United States in the Court of Claims, and ought not to be questioned here.

If the pine lands and agricultural lands were to be sold, of course as soon as the Congress put it beyond the power of the Government to execute the trust the cause of action arose, and was only in abeyance until the Indians were authorized by special act to bring suit against the United States.

The value of the pine lands and agricultural lands obtained, the sales would be held to be as of that date, to-wit: December 19th, 1893.

Since the moneys realized from the sales of the pine and agricultural lands were to be paid into the United States Treasury and draw interest at the rate of five per cent per annum, as provided in such act, the Indians would be entitled to interest at that rate from such date on such value.

This is in accordance with the cases cited to this proposition.

In the case of United States v. Blackfeather, *supra*, it was held the United States, having undertaken, by article 7 of the treaty of August 8th, 1831, with the Shawnees, "to expose to public sale to the highest bidder" the lands ceded to them by the Shawnees, and having disposed of a large part of the same at private sale, were thereby guilty of a violation of trust; under the provisions of said treaty the Shawnees were entitled to interest on such damages as annuity.

And on page 192 of such case this court, speaking through Mr. Justice Brown, said:

> "Are the Indians entitled to interest upon this amount? By Rev. Stat., Par. 1091: 'No interest shall be allowed upon any claim up to the time of

the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest.' The real question here is whether there was a contract expressly stipulating for the payment of interest, or is this a mere claim for unliquidated damages?

"By the seventh article of the treaty, it was agreed that the proceeds of the lands, after making the several deductions, 'should constitute a fund for the future necessities of said tribe, parties to this compact, on which the United States agree to pay to the chiefs, for the use and general benefit of their people, annually, five per centum on the amount of said balance, as an annuity. Said fund to be continued during the pleasure of Congress, unless the chiefs of the said tribes or band, by and with the consent of their people, in general council assembled, should desire that the fund thus to be created should be dissolved and paid over to them.' While this is not literally an agreement to pay interest, it has substantially that effect. It is true it is called an annuity, but the amount of the annuity is measured by the interest paid upon funds held in trust by the United States (Rev. Stat., Par. 3659) upon investments for Indians (Par. 2096), as well as by the interest paid upon an affirmance by this court of judgments of the Court of Claims." (Par. 1090.)

Now, in the instant case, section 7 of the act of January 14th, 1889, provides:

"That all moneys accruing from the disposal of said lands in conformity with the provisions of this act shall * * * be placed in the treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a

permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of 50 years.

So, there can be no doubt that the money was to draw interest, and it was to draw interest for 50 years. Inasmuch as this land was obtained from the Mille Lacs under the act of January 14th, 1889, it is not too much to say that the Government agreed to pay interest at the rate of five per cent.

The other cases cited are to the same effect as the Blackfeather case.

XI.

THE PASSAGE OF THE JOINT RESOLUTION OF DECEMBER 19TH, 1893 (28 STAT. L., 576), AND THE PASSAGE OF THE JOINT RESOLUTION OF MAY 27TH, 1898 (30 STAT. L., 745), DO NOT INDICATE ANY INTENTION ON THE PART OF CONGRESS TO CONFISCATE THE MILLE LAC RESERVATION, OR THAT IN THE EXERCISE OF ITS PLENARY POWER CONGRESS INTENDED TO TAKE FROM THE CHIPPEWAS OF MINNESOTA THE VALUE OF SUCH RESERVATION.

The joint resolution of December 19th, 1893, provides:

> "That all bona fide pre-emption or homestead filings or entries allowed for lands within the Mille Lac Indian Reservation, in the State of Minnesota, between the ninth day of January, eighteen hundred and ninety-one, the date of the decision of the Secretary of the Interior holding that the lands within said reservation were subject to disposal as other public lands under the general land laws, and the date of the receipt at the district land office at Tay-

lor's Falls, in that State, of the letter from the Commissioner of the General Land Office communicating to them the decision of the Secretary of the Interior of April twenty-second, eighteen hundred and ninety-two, in which it was definitely determined that said lands were not so subject to disposal, but could only be disposed of according to the provisions of the special act of January fourteenth, eighteen hundred and eighty-nine (25 Stat., 642), be, and the same are hereby, confirmed where regular in other respects, and patent shall issue to the claimants for the lands embraced therein, as in other cases, on a satisfactory showing of a bona fide compliance on their part with the requirements of the laws under which said filings and entries were respectively allowed."

The joint resolution of March 27th, 1898, provides:

"That all public lands formerly within the Mille Lac Indian Reservation, in the State of Minnesota, be, and the same are hereby, declared to be subject to entry by any bona fide qualified settler under the public land laws of the United States; and all pre-emption filings heretofore made prior to the repeal of the pre-emption law by the act of March third, eighteen hundred and ninety-one, and all homestead entries or applications to make entry under the homestead laws, shall be received and treated in all respects as if made upon any of the public lands of the United States subject to pre-emption or homestead entry."

Referring again to what we have said under proposition IX, we once more affirm:

The court would not be warranted in holding that, by the passage of such two joint resolutions, it was the intention of Congress, in the exercise of its plenary power, to confiscate such Mille Lac Reservation.

It would be, indeed, too violent an assumption for the court to make unless in such resolutions Congress had so expressed itself in specific terms.

The proper assumption would rather be that Congress was exercising its plenary power, because of the many varying rulings of the land department, to treat the settlers fairly and also to treat the Indians in good faith. In other words, that finally, as was done, Congress would pass a law authorizing the Indians to bring a suit against the United States for its failure to execute the trust in reference to the Mille Lac Reservation.

This court has never yet held that the Congress, in the exercise of its plenary power, has the absolute right of confiscation of Indian property.

If Congress by such two joint resolutions intended to confiscate the Mille Lac Reservation, why did Congress pass the jurisdictional act of February 15th, 1909, the statute under which this suit is brought?

Would Congress submit to the Court of Claims for its determination the proposition, "Has Congress in the exercise of its plenary power, the right to confiscate Indian property?"

That is all there would be left for the Court of Claims to determine.

Counsel contended in the court below that the passage of these two joint resolutions simply nullified any agreement to execute the trust as provided by the act of January 14th, 1889, and still so contend.

In Lone Wolf v. Hitchcock, 187 U. S., 553, on page 564, the then Mr. Justice, now Chief Justice, White, speaking for the Court, said:

"Now, it is true that in decisions of this court the Indian right of occupancy of tribal lands, whether declared in a treaty or otherwise created, has been stated to be sacred, or, as sometimes expressed, as sacred as the fee of the United States in the same lands. Johnson v. McIntosh (1823), 8 Wheat., 543, 574; Cherokee Nation v. Georgia (1831), 5 Pet., 1, 48; Worcester v. Georgia (1832), 6 Pet., 515, 581; United States v. Cook (1873), 19 Wall., 591, 592; Leavenworth, etc., R. R. Co. vs. United States (1875), 92 U. S., 733, 755; Beecher v. Wetherby (1877), 95 U. S., 517, 525. But in none of these cases was there involved a controversy between Indians and the Government respecting the power of Congress to administer the property of the Indians. The questions considered in the cases referred to, which either directly or indirectly had relation to the nature of the property rights of the Indians, concerned the character and extent of such rights as respected States or individuals. In one of the cited cases it was clearly pointed out that Congress possessed a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and that such authority might be implied, even though opposed to the strict letter of a treaty with the Indians. Thus, in Beecher v. Wetherby, 95 U. S., 517, discussing the claim that there had been a prior reservation of land by treaty to the use of a certain tribe of Indians, the court said (p. 525):

" 'But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee,

it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action toward the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians.' "

In the case of Cherokee Nation v. Hitchcock, 187 U. S., 294, "there was involved the question of the power of Congress to provide a method for determining membership in the five civilized tribes, and for ascertaining the citizenship thereof preliminary to a division of the property of the tribe among its members, and whether Congress was vested with authority to adopt measures to make the tribal property productive, and secure therefrom an income for the benefit of the tribe."

The then Mr. Justice, now Chief Justice, White rendered the opinion in that case, and on page 307 of the opinion, speaking for the Court, said:

"There is no question involved in this case as to the *taking* of property; the authority which it is proposed to exercise, by virtue of the act of 1898, has relation merely to the *control and development* of the tribal property, which still remains subject to the administrative control of the government, even though the members of the tribe have been

invested with the status of citizenship under recent legislation.

"We are not concerned in this case with the question whether the act of June 28, 1898, and the proposed action thereunder, which is complained of, is or is not wise, and calculated to operate beneficially to the interests of the Cherokees. The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts."

(Italics ours.)

Now, in neither of these cases does this Court go to the extreme of saying that Congress has the power to confiscate Indian property.

But granted, for the sake of argument, that Congress has such power; it is a power of such arbitrary character that, unless expressed in terms absolutely specific in their meaning, no Court would be warranted in holding that Congress had exercised such power.

In the instant case it seems most reasonable to appellee that this Court, construing the two joint resolutions with the jurisdictional act, must say that Congress never intended to confiscate the Mille Lac Reservation, that Congress never intended that the Chippewa Indians of Minnesota should suffer damage on account of the failure of the Government to execute the trust as provided in the act of January 14th, 1889, in reference to the Mille Lac Reservation.

Therefore, we contend that the passage of the joint resolution of December 19th, 1893, and the passage of the

joint resolution of May 27th, 1898, do not indicate any intention on the part of Congress to confiscate the Mille Lac Reservation, or that in the exercise of its plenary power Congress intended to take from the Chippewas of Minnesota the value of such reservation.

XII.

UNDOUBTEDLY CONGRESS, WITH THE CONSENT OF THE INDIANS, HAD THE RIGHT TO POOL THE INTERESTS OF ALL THE CHIPPEWAS OF MINNESOTA, CLASSIFY AND SELL THEIR LANDS AND DIVIDE THE PROCEEDS AMONG THEM AS PROVIDED BY THE ACT OF JANUARY 14, 1889.

By section 7 of that act it is provided,

> "That all money accruing from the disposal of said lands in conformity with the provisions of this act shall, after deducting all the expenses of taking the census, of obtaining the cession and relinquishment, of making the removal and allotments, and completing the surveys and appraisals in this act provided, be placed in the treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which shall draw interest at the rate of five per centum, payable annually, for the period of 50 years. * * * and at the expiration of said 50 years, the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares."

At the time of the passage of the act of January 14, 1889, there were ten Indian reservations in the State of Minnesota belonging to the Chippewa Indians of that State.

As we have seen, at the time of the cession and relinquishment of the ten Chippewa Reservations to the United States under the Nelson Act there were 8,304 Chippewa Indians in the State of Minnesota; 3,002 were Chippewas of the Mississippi, 895 of the Chippewas of the Mississippi were Mille Lac Indians or members of the Mille Lac band. The Mille Lac band, therefore, comprised about one-third of the Chippewas of Mississippi and nearly one-ninth of the entire Chippewa Indians of Minnesota.

As appears from such act of January 14, 1889, the plan and scheme of the United States was to get these several bands of Chippewas of the state of Minnesota and the Chippewas of the Mississippi to live together, as far as possible upon two reservations, viz., the White Earth Reservation and the Red Lake Reservation. Hence, the peculiar provisions of the act of January 14, 1889.

But the United States did not intend to compel obedience to their scheme or plan, and so, accordingly, in section 3 of the act of January 14, 1889, as we have before stated, it was provided:

> "That any of the Indians residing on any of said Reservations may, in his discretion, take his allotment in severalty under this act on the reservation where he lives at the time of the removal herein provided for is affected, instead of being removed to and taking such allotment on White Earth Reservation."

Pooling of Interests.

It was also the understanding and agreement of the United States and these several bands of Chippewas of Minnesota, including the Chippewas of the Mississippi, that each and every of the ten reservations ceded and relinquished to the United States, was ceded and relinquished in accordance with the provisions of the act of January 14, 1889, and that the provisions of that act and all of them applied to each and every one of those reservations.

As already suggested, section 1 of the act of January 14, 1889, concludes as follows:

> "And the acceptance and approval of such cession and relinquishment by the President of the United States shall be deemed full and ample proof of the assent of the Indians, and shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever *for the purpose and upon the terms in this act provided.*"

Reading the entire act, with section 7, of which a part has already been quoted, it thus plainly appears, that in accordance with the agreements the several bands were each and all to pool their interests. But there were ten separate instruments of cession and relinquishment.

Referring to that point in his letter to President Harrison, under date of January 30, 1889, Secretary Noble says:

> "I invite attention to the fact that the instruments presented by the Commission as the result of the ne-

gotiations, and as the evidence that the Chippewa Indians in Minnesota have given their consent in writing to the cession and relinquishment of their title and interest in and to the lands as therein set forth, comprise ten parts, marked separately as A, B, C, D, E, F, and H, G, I, K, and L. These, however, in fact constitute as a whole one instrument, and the part marked C, entitled 'Signatures Roll Mississippi Chippewa Indians, White Earth Reservation, Minnesota,' should be placed and considered as the first part for the reason that it is the only part that embraces the text of the act under and for the purposes of which the Commission was appointed.

"This is considered necessary, in view of the fact that the act is not recited in the other parts of the instrument, but is referred to therein as follows:

"'Which said act is embraced in the foregoing instrument,' meaning evidently that part marked C, etc., as above stated.

"With this as explanation, and as a matter of record for proper understanding of the instruments, I think it would nevertheless be well for the approval of the President to be endorsed upon each of the separate parts of said instrument." (Ex. Doc., 247, pp. 11, 12.)

Accordingly, President Harrison approved each one of the ten agreements separately; but, as was well said by the Secretary of the Interior, the ten cessions and relinquishments together constitute but one agreement.

Therefore, to change any part of any of the ten agreements would be to change the entire agreement.

All the parties have consented to the pooling of their several and joint interests, why should counsel be heard to raise some objection, which some one of the parties might have raised at the outset, but which none of the parties did raise?

We have cited no authorities to sustain our contention, but we believe that Congress, in the exercise of its plenary power, made these provisions, and it is not within the power of counsel for appellant by argument only, to destroy the provisions of the act of 1889.

Inasmuch as each of the dissenting opinions makes reference to the Fond du Lac Indian case, 34 C. Cls., 426 (Rec. pp. 43, 55,), we offer the following suggestions in reference to that case.

The Fond du Lac case arose out of the following facts:

On September 30, 1854, the United States made a Treaty with the Chippewa Indians of Lake Superior and the Mississippi.

By the terms of that Treaty to the Fond du Lac band was ceded a reservation by metes and bounds, which was to contain not less than 100,000 acres of land, and which was also to include the principal settlements and buildings of the Fond du Lac band.

In 1858 a survey was made of such proposed Fond du Lac Reservation, and it was found to contain 125,294 acres.

However, after such survey of the proposed reservation was made, it was found that such reservation did not extend on the south to within several miles of the principal settlements and buildings of such Indians.

In 1859, by order of the President, another survey was made of a second reservation.

This new survey included the principal settlements and buildings of the Indians.

In the later survey the southern boundary of the reserva-

tion was extended five miles and five chains further south than in the former survey, thereby adding 41,280 acres of land on the south.

However, in the latter survy there was taken off from the west side of the former suvey a strip of land containing 66,453 acres.

The land added on the south in the new survey was rolling, arable land, and very productive; while the land taken off from the west of the former survey by the new survey was low and swampy and unfit for agriculture.

The 41,280 acres of land added on the south in the later survey were equal in value to the 66,453 acres taken off on the west.

Hence, the Fond du Lac Indians lost nothing by the exchange.

At the time the later survey was made the Indians seemed satisfied.

The 66,453 acres taken off on the west by the second survey were opened to public settlement and sold.

The officers of the government understood that the Indians were satisfied with the new reservation.

From 1859 until 1889 a period of thirty years, the Fond du Lac Indians were content and occupied only the later survey.

During all this period of thirty years, the Fond du Lac Indians made no claim to the 66,453 acres taken off on the west or any part thereof.

However, when the commissioners appointed under the Act of January 14, 1899, were negotiating with the Fond du Lac band for the Fond du Lac Reservation the Fond du Lac Indians called the attention of the commissioners to the decrease in the acreage of their reservation by the later survey, and the commissioners promised to bring the same to the attention of the United States.

Accordingly, when the commissioners made their report they called the attention of the United States to the difference in area between the former and the latter survey.

The result was that on June 7, 1897, Congress passed an Act authorizing the Fond du Lac band to bring a suit against the United States, in the Court of Claims, which Court was given jurisdiction:

I. To find the difference in area between the former and later survey.

II. And whether or not there had been, since such later survey, any equitable adjustment made to the Fond du Lac Indians for such difference in area, and such Act further provided that the Court in so determining: "shall also take into consideration, and make due allowance for, the fact that said Indians were given a share in the proceeds of the lands sold and disposed of under and pursuant to the provisions of the Act of January 14, 1889."

The suit was brought, and the Court of Claims found, in effect, that the second reservation was equal in value to the first reservation, that is to say, that the tract of 61,280 acres added on the south was equal in value to the tract of 60,800 acres taken off on the west.

Hence, there was no equity in the claim of the Indians.

The Court of Claims also found that the Fond du Lac Indians were also permitted to participate in the proceeds of the sale of the lands of all the reservations, etc., which was also an equitable adjustment, taking into account the small area of the Fond du Lac Reservation in comparison to the west area put into the pool.

However, this last point was by no means essential to the decision. For, if the value of the tract added on the south was equal to the value of the tract taken off on the west there was no damage, and hence no equity.

On page 434 of the decision in the Fond du Lac case, Mr. Chief Justice Peelle, speaking for the Court, said:

> "The findings show that the difference 'between the area of the reservation actually set apart to said Indians and that provided to be set apart in said treaty is 25,173 acres.'
>
> "That being established, it only remains for the court, in the language of the act, 'to take into consideration and determine whether, since the date of said treaty, there has been any equitable adjustment made to said Indians, in whole or in part, for the alleged difference in area,' and in the determination of that question the act provides that 'the court shall also take into consideration and make due allowance for the fact that said Indians were given a share in the proceeds of the lands sold and disposed of under and pursuant to the provisions' of the act of January 14, 1889."
>
> *"Although the original reservation was diminished 25,173 acres, it is quite evident from the findings of fact that the lands on the west, excluded by the last survey, were of no greater value than the lands added on the south, so that in respect of the value of the original and diminished reservations there was little, if any, difference."*

And, on page 436, Mr. Chief Justice Peelle, speaking for the Court, said:

> *"It is true that such benefit results to them by reason of the annual action of their brethren in the cession of their reservation as aforesaid, but the Congress, by the language of the act of our jurisdiction,*

commends us by the imperative shall, 'to take into consideration and determine whether since the date of said treaty there has been any equitable adjustment to said Indians in whole or in part for the alleged difference in area,' and further that 'the court shall also take into consideration and make due allowance for the fact that the said Indians were given a share in the proceeds of the lands sold and disposed of under and pursuant to the provisions of the Act entitled 'An act for the relief and civilization of the Chippewa Indians in the State of Minnesota,' approved January 14, 1889.

"Hence, taking into consideration the character of the lands added on the south and those excluded on the west of the original survey, by the new or Forbes survey, the court is of the opinion that there was little, if any, difference in the value of the two areas occasioned thereby."

So, after all, the real ground of the decision in the Fond du Lac case was that the difference in value between the original and diminished reservations was nothing. In other words, there was no equity in the claim of the Fond du Lac Indians.

The Fond du Lac Reservation, however, was sold and the proceeds of the sale went into the general fund for distribution. As already remarked the Mille Lac Reservation was not sold; hence, the Minnesota Indians have been deprived of the value of the Mille Lac Reservation.

We have already suggested that while there were ten instruments of cession and relinquishment, each of which was separately approved by President Harrison; yet, as stated by the Secretary of the Interior in his letter of trans-

mittal to the President heretofore quoted from, there was only one agreement.

That one agreement was that the Chippewa Indians of Minnesota on the one part ceded and relinquished to the United States of the other part ten reservations in trust, as provided by the Nelson Act. The United States accepted the trust, and agreed to dispose of the ten reservations as provided by the Nelson Act.

That agreement required that the United States should dispose of all ten of the reservations and pay the proceeds of the sales of such reservations into the United States Treasury for distribution as provided in such act.

The agreement is not fulfilled by allowing, as suggested by counsel, the Mille Lac Indians to participate in the general distribution.

The Mille Lacs, as joint owners, with the other Chippewas of the Mississippi, of the White Earth Reservation, and, as joint owners, with the other Minnesota Chippewas, of the Red Lake Reservation, were, independently of the Mille Lac Reservation, as much entitled to participate in the general distribution as any one of the other five bands of the Chippewas of the Mississippi, or as any band of the Minnesota Chippewas. And to say now that they were paid for the relinquishment of their right of occupancy to the Mille Lac Reservation by being allowed to participate in such distribution is to say that that right of occupancy was of no value whatever. More, it is to say that in order that the Mille Lac Indians may enjoy equal rights with the other five bands of the Chippewas of the Mississippi, they shall be required to give a bonus, viz., their rights in the Mille Lac Reservation, the *present* given to them for loyalty by the United States in 1863.

So that instead of being paid twice for the Mille Lac Reservation they have as yet been paid nothing, nor have the Minnesota Indians.

XIII.

THE JUDGMENT OF THE COURT OF CLAIMS SHOULD BE AFFIRMED.

Finally, the questions involved in this suit do not seem complicated, but clear and simple.

The appellee was not served with the brief of the appellant in this case until Friday morning, April 4th. Hence, we have, perhaps, repeated ourselves somewhat in our discussions and not always expressed ourselves as tersely as we should. However, we have tried, in the propositions discussed to meet all the arguments of appellant.

Counsel have in some instances stated that certain facts are conceded. We make no concession whatever outside of the facts that we have stated; and, excepting what we have admitted in our discussion, we do not in any way concede the legal propositions of appellant.

We do not think that any of the cases cited by counsel for appellant are in conflict with the contention of appellee.

On February 22, 1855, the United States entered into a treaty with the Gull Lake, Mille Lac, Sandy Lake, Pokagomin Lake, Rabbit Lake and Rice Lake bands of Indians known as the Chippewas of the Mississippi. This treaty secured to the United States a cession of all the lands belonging to the various bands of Indians mentioned in the State of Minnesota, and set apart for them specific reservations mentioned in the treaty for permanent homes. The reservations set apart for the Mille Lac Indians embraced 61,028.14 acres and was known as the Mille Lac Reservation.

During the year 1862 the Mille Lac band of Chippewas of the Mississippi rendered a great service to the United States by preventing the uprising of the other bands of the

Chippewas of the Mississippi and their joining with the Sioux in an Indian war for the massacre of the white people in Minnesota.

On March 11, 1863, the United States persuaded the Chippewas of the Mississippi to enter into another treaty, and by the terms of that treaty five of the reservations which were ceded to the Chippewas of the Mississippi by the treaty of 1855 were ceded back to the United States and there was reserved by the Chippewas of the Mississippi, the United States consenting, the Mille Lac Reservation to the Mille Lac band of Indians to be occupied by them so long as they should not in any manner interfere with the persons or property of the whites.

This reserving of the Mille Lac Reservation to the Mille Lacs was in a proviso to article 12 of such treaty, and the United States allowed or consented to such reservation in consideration of the patriotic conduct of the Mille Lac band in so preventing an Indian war, and the further condition that they should continue loyal to the Government by not interferring with the persons or property of the whites.

The Mille Lac band of Indians understood and believed that the proviso to article 12 secured to them the Mille Lac Reservation for a permanent home, and they continued to occupy such reservation in that belief, giving notice to the whole world that they were the owners of such reservation, until the act of January 14, 1889, was passed. Then the commissioners appointed by the President to secure the cession and relinquishment of all the reservations of the Chippewas of Minnesota went to their reservation, and, after several meetings in council with the head men and members of the Mille Lac band, the Mille Lac band finally relinquished to the United States the Mille Lac Reservation, as they believed and understood, and as they were in-

formed by the commissioners, under and in accordance with the provisions of the act of January 14, 1889.

The United States accepted such relinquishment under such act; and the cession and relinquishment of the Mille Lac band was approved by President Harrison.

By the act of January 14, 1889, these various Indian Reservations were ceded and relinquished to the United States in trust, according to the provisions of the act of January 14, 1889.

In reference to the Mille Lac Reservation the Government failed to execute the trust and finally placed itself in a condition where it was impossible to fulfil the trust, and, thereafter and on February 15, 1909, Congress passed the jurisdictional act giving to the Court of Claims jurisdiction to hear and determine a suit or suits to be brought by and on behalf of the Mille Lac band of Chippewa Indians of the state of Minnesota against the United States on account of losses sustained by them or the Chippewas of Minnesota by reason of the opening of the Mille Lac Reservation in the state of Minnesota, embracing about 61,000 acres of land, to public settlement under the general land laws of the United States.

After due consideration the Court of Claims have rendered the judgment in this case, and, we believe because of the premises, that judgment of the Court of Claims should be affirmed.

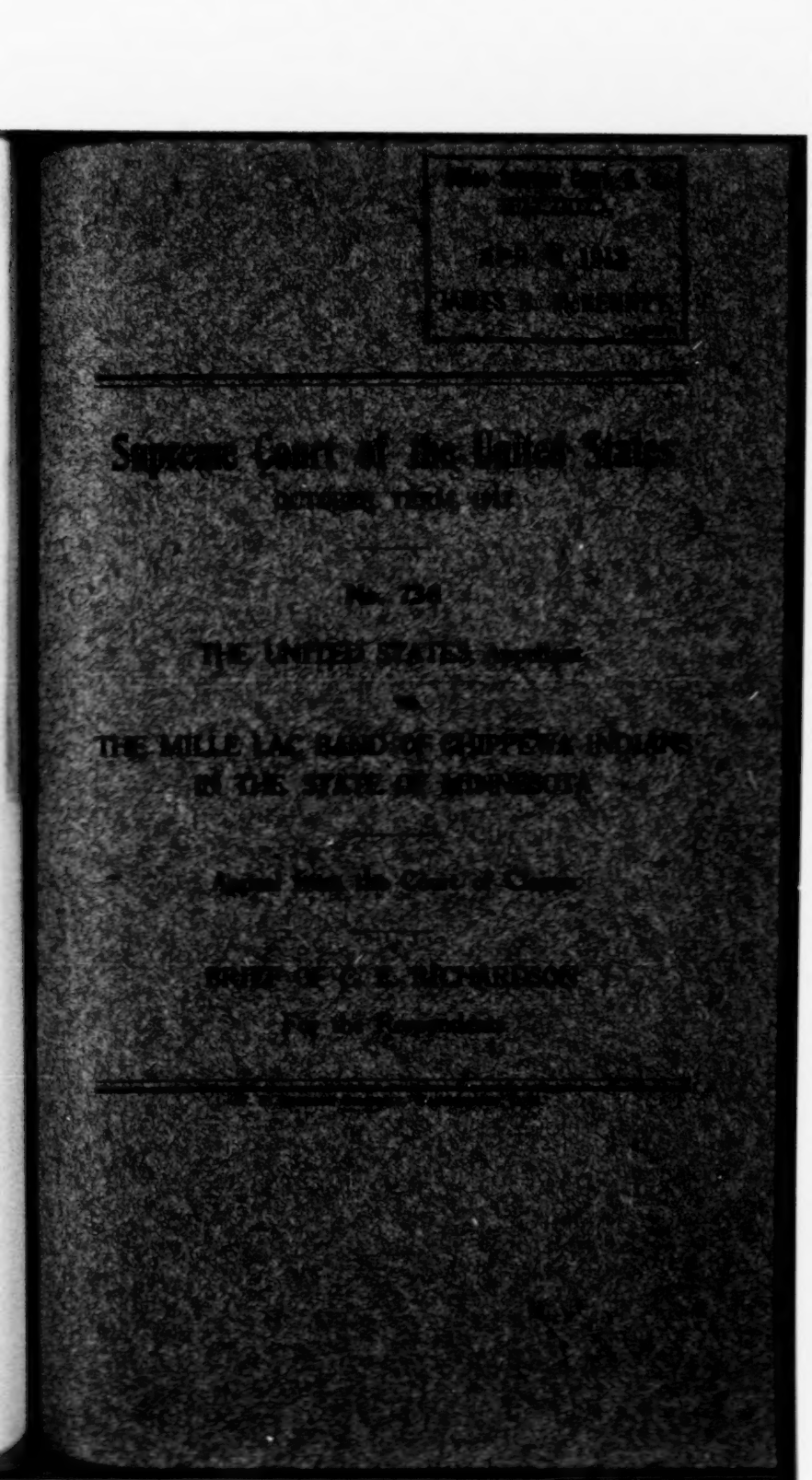
Respectfully submitted,

GEORGE B. EDGERTON,
Attorney for Appellee.

F. W. HOUGHTON,
HARVEY S. CLAPP,
DANIEL B. HENDERSON,
of Counsel for Appellee.

EXHIBIT "A."

	TOTAL	ADULTS		MINORS		ORPHANS	
		MALE	FEMALE	MALE	FEMALE	MALE	FEMALE
Red Lake and Pembina bands:							
Red Lake	1168	303	359	237	247	15	7
Pembina	218	83	63	38	33		1
Total	1386	386	422	275	280	15	8
Mississippi bands:							
White Earth	1169	284	279	300	292	9	5
Gull Lake and scattering	277	61	75	49	89	1	2
White Oak Point	661	176	211	129	114	15	16
Mille Lac	895	213	289	180	204	6	3
Total	3002	734	854	658	699	31	26
Pillager and Lake Winnibigoshish bands:							
Leech Lake	1141	324	348	239	215	8	7
Otter Tail	657	164	180	154	158		1
Cass Lake	241	67	71	53	43	1	6
Lake Winnibigoshish	169	45	50	34	33	3	4
Total	2208	600	649	480	449	12	18
Grand Portage, Boise Forte and Fond du Lac bands:							
Grand Portage	294	73	85	60	71	2	3
Bois Forte	743	228	224	153	132	3	3
Fond du Lac	671	157	187	168	140	9	10
Total	1708	458	496	381	343	14	16



The Jurisdictional Act

The Act conferring jurisdiction upon the courts "to hear and determine" this cause, if it did not indeed "create a claim," was at least a recognition of the existence of a cause. The language of the statute was similar to that employed in numbers of related instances where Congress, appreciating its lack of facilities for hearing a case on its merits, delegated its powers to the judiciary, and vested the courts with all necessary authority to perform this duty and to pronounce final judgment. Where the Court of Claims has validated claims under like authority, we find no record of the denial of this power.

The Indian Affairs Committee of the House of Representatives, in its very comprehensive report upon the bill (H. R. 24054) which was afterward enacted into the statute in question, said:

> "This bill is for the purpose of allowing the Mille Lac Indians in Minnesota to procure from the Court of Claims a decision as to their rights and equities in and to the Mille Lac Reservation, or to indemnity for losses sustained by them on account of the opening of the Mille Lac Reservation to public settlement under the general land laws of the United States.
>
> The evidence in support of the bill seems to show that the Mille Lac Reservation has been added to the public domain and entered under the homestead laws, but fails to show in terms that any adequate compensation has been given or agreed upon for property so taken, notwithstanding the equitable doctrine which forbids a guardian or trustee to take a profit from the ward or beneficiary.
>
> The committee believe that an opportunity should

be given these Indians to show what rights, if any, remain to them under treaties and agreements heretofore made with the Government, and therefore recommend the passage of the said bill without amendment."

This report was agreed to only after a long and careful consideration of the matter by the committee, which included a hearing at which several Mille Lac chiefs related their grievances.

Courts May Review.

It is contended by the opposing counsel that the courts have no jurisdiction to review the exercise of the plenary power of Congress in dealing with the tribal property of tribal Indians. This was true of the cases cited by counsel; but in this case Congress has directed that its plenary power shall be reviewed. Congress has paused and considered, and has admitted that it may have violated the treaties and abused its own plenary power. Congress has virtually said "if we were guilty of an injustice to the Mille Lac Indians when we ratified the unauthorized acts of the land department in accepting filings on the reservation, we want to make amends." What Congress did was to refer the matter to the judiciary, with full legal and equitable jurisdiction to investigate and say what rights the Mille Lac Indians had under the treaties, what rights had been impaired and what these rights were worth. And Congress went still further when it directed the courts to remedy the error found, by rendering a final judgment therefor. The question of jurisdiction is amply provided for in the Act of February 15, 1909, by direction of which this cause was initiated, and the statute speaks for itself.

The Treaties and Agreements.

The laws and treaties to be considered in this case are but four—three treaties and one statute, the latter of which was

agreed to by the Indians and was given the appearance of a treaty. These have been made to appear very formidable, and have been misconstrued and tortured into the very opposite of their intent. The treaty of February 22, 1855 (10 S. L. 1165) ceded to the Government millions of acres, reserving, among other reservations, the Mille Lac Reservation now at bar. The treaty of March 11, 1863 (12 S. L. 1249) divested the other Indians, the Chippewas of Minnesota, of their common share in the ownership of the Mille Lac Reservation, but did not change the status of those for whom it was originally reserved, the Mille Lac Indians. The treaty of May 7, 1864 (13 S. L. 693) practically reiterated the preceding treaty. The Act of January 14, 1899 (25 S. L. 642) provided for the opening and sale of various Chippewa Reservations in Minnesota, and the Mille Lac Indians joined in it because of their common interest in all the tribal lands of said Chippewas in general, but upon the understanding that their consent to this Act should not invalidate any rights which they had in and to the Mille Lac Reservation.

C. E. RICHARDSON,
Of Counsel for Respondents.

UNITED STATES *v.* MILLE LAC BAND OF CHIPPEWA INDIANS IN THE STATE OF MINNESOTA.

APPEAL FROM THE COURT OF CLAIMS.

No. 736. Argued April 8, 9, 1913.—Decided June 9, 1913.

When Congress passed the act of January 14, 1889, adjusting relations with the Mille Lac Chippewas a real controversy was subsisting which was thereby adjusted and composed, and the act is to be construed according to its plain and unambiguous terms.

Indians, no less than the United States, are bound by the plain import of the language of an act of Congress and an agreement conferring substantial benefits on them.

Under the act of January 14, 1889, the Mille Lac Chippewas received substantial benefits in consideration whereof they released their claims to lands in the Red Lake Reservation upon which there were valid preëmption and homestead entries, and the United States is not bound to account to them for the proceeds of sale of such lands; but, as to the other lands, the United States held them in trust for the Mille Lac Chippewas who are entitled to damages under the act on the basis of the value of such lands in 1889.

In interpreting a proviso in a statute, it will not be given a meaning that would amount to entirely rejecting it.

In a contract with Indians, such as that embodied in the act of January 14, 1889, a reference to regular and valid preëmption and homestead entries of land within a reservation would include all that were not fraudulent and would not exclude all entries on the ground of invalidity because made on lands within an Indian reservation.

47 Ct. Cl. 415, reversed.

THE facts, which involve the construction and interpretation of the various treaties, agreements and statutes relating to the Mille Lac Reservation, are stated in the opinion.

Mr. Assistant Attorney General Adkins and *Mr. George M. Anderson* for the United States.

Mr. George B. Edgerton and *Mr. F. W. Houghton*, with whom *Mr. C. E. Richardson*, *Mr. Harvey S. Clapp* and *Mr. Daniel B. Henderson* were on the brief, for appellees.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This suit was begun under the act of February 15, 1909, 35 Stat. 619, c. 126, which authorized the Court of Claims "to hear and determine a suit or suits to be brought by and on behalf of the Mille Lac Band of Chippewa Indians in the State of Minnesota against the United States on account of losses sustained by them or the Chippewas of Minnesota by reason of the opening of the Mille Lac Reservation . . . to public settlement under the general land laws of the United States."

The lands to which the act and the suit relate are four fractional townships bordering on the Mille Lac in Minnesota, and three islands in that lake, comprising in all a little more than 61,000 acres. The suit was begun in the name of the Mille Lac Band, and the Court of Claims, two judges dissenting, gave judgment against the United States in the sum of $227,580.72, with a direction, in substance, that the amount recovered be credited to the Chippewas of Minnesota and distributed among them under the provisions of § 7 of the act of January 14, 1889, 25 Stat. 642, c. 24. 47 Ct. Cl. 415. The case is here upon the appeal of the United States.

The judgment was sought and was rendered on the theory that the lands were set apart and reserved for the occupancy and use of the Mille Lac Band by treaties of February 22, 1855, 10 Stat. 1165; March 11, 1863, 12 Stat. 1249, and May 7, 1864, 13 Stat. 693, and were subsequently relinquished to the United States pursuant to the act of January 14, 1889, *supra*, upon certain trusts therein named, and that in violation of those treaties and

that act they were opened to settlement and disposal under the general land laws of the United States and were disposed of thereunder, to the great loss and damage of the Mille Lac Band of the Chippewas of Minnesota.

The arguments at the bar and in the briefs are addressed to these questions: 1. The scope of the jurisdictional act. 2. The rights of the Indians in the lands under the treaties of 1863 and 1864. 3. The effect to be given to the act of 1889 and its acceptance by the Indians. 4. Whether the disposal of the lands, or any of them, under the general land laws was violative of the rights of the Indians.

The jurisdictional act makes no admission of liability, or of any ground of liability, on the part of the Government, but merely provides a forum for the adjudication of the claim according to applicable legal principles. Nor does it contemplate that recovery may be founded upon any merely moral obligation, not expressed in pertinent treaties or statutes, or upon any interpretation of either that fails to give effect to their plain import, because of any supposed injustice to the Indians. *United States* v. *Old Settlers*, 148 U. S. 427, 469; *United States* v. *Choctaw &c. Nations*, 179 U. S. 494, 735; *Sac and Fox Indians*, 220 U. S. 481, 489.

Under the treaty of 1855, *supra*, there were reserved for the occupancy and use of the Mississippi bands of Chippewas, of which the Mille Lac Band was one, six separate tracts of land in Minnesota. One of these embraced the townships and islands before mentioned, and came to be separately occupied by the Mille Lacs, although all the reservations were claimed in common by all the bands. By the treaty of 1863, *supra*, the lands in the six reservations, the one occupied by the Mille Lacs being in terms included, were expressly ceded to the United States (Art. I), and one large tract of other lands in Minnesota was reserved for the future home of all the bands, including

the Mille Lacs (Art. II). Provision was made (Art. IV) for clearing and breaking a limited area in the new reservation for each of the bands, the Mille Lacs being in terms included, and (Art. VI) for removing the agency and saw mill from one of the ceded reservations to the new. Article XII of this treaty was as follows,—special importance being now attached to its proviso (p. 1251):

"It shall not be obligatory upon the Indians, parties to this treaty, to remove from their present reservations, until the United States shall have first complied with the stipulations of Articles IV. and VI. of this treaty, when the United States shall furnish them with all necessary transportation and subsistence to their new homes, and subsistence for six months thereafter: *Provided*, That, owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites."

The treaty of 1864, *supra*, superseded that of 1863, and in so far as their provisions are material here they were identical, so we shall speak only of the later one. In addition to the creation of the single large reservation, provision was made for the payment of large annuities to the Indians in consideration for the cession of the six original reservations, and it is not questioned that these annuities were duly paid to all the bands, including the Mille Lacs, nor that there was a full compliance with Articles IV and VI.

A treaty negotiated in 1867, 16 Stat. 719, eliminated a considerable portion of the large tract reserved by Article II of the treaty of 1864 and substituted a new tract, consisting of thirty-six townships, which came to be known as the White Earth Reservation. This treaty is not important here, save as it explains subsequent references to the White Earth Reservation.

A controversy soon arose over the meaning and effect

of the proviso to Article XII of the treaty of 1864 declaring, "that, owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove [from the old reservation to the new one] so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites." On the part of the executive and administrative officers it was insisted—not, however, without some differences among themselves—that the proviso did not invest the Mille Lacs with any right in the old reservation expressly ceded by Article I of the treaty, but merely permitted them to remain thereon as a matter of favor; that one purpose of the cession was to enable the Government to survey the lands and open them to settlement, and that it was not intended that the permission to remain should interfere with this. But the Mille Lacs maintained that the proviso operated to reserve the lands for their occupancy and use indefinitely, and that the lands could not be opened to settlement while they remained and conducted themselves properly towards the whites in that vicinity. The survey was made, the lands were declared open to settlement and entry, and entries in considerable numbers were allowed from time to time; but the Mille Lacs persisted in their claim and refused to move, although repeatedly entreated to do so. This continued to be the situation until the act of 1889 was passed by Congress and accepted by the Mille Lacs and other Chippewas of Minnesota. In the meantime an order was issued by one Secretary of the Interior suspending the allowance of further entries, as also further action upon those already allowed, and this order was recalled by a succeeding Secretary. Congress then passed the act of July 4, 1884, 23 Stat. 76, 89, c. 180, directing that the lands should not "be patented or disposed of in any manner until further legislation." The entries allowed up to that time covered about 55,000 acres, or approximately nine-tenths of the lands, and some were under

investigation upon charges that they were fraudulent. After the passage of the act of 1884, all further action was suspended awaiting further legislation.

That legislation came in the act of 1889. It provided for a commission to negotiate with all the bands of Chippewas in Minnesota for the cession and relinquishment of all their reservations, excepting the White Earth and Red Lake Reservations, and for the cession and relinquishment of so much of them as should not be required for allotments. It further provided that the cession and relinquishment should be obtained as to each reservation, other than the Red Lake, through the assent in writing of two-thirds of the male adults of the band "occupying and belonging to" it, and, as to the Red Lake Reservation, through a like assent of two-thirds of the male adults of all the Chippewas in the State; that the cession and relinquishment as to each reservation should be subject to the approval of the President, and when approved should operate as a complete extinguishment of the Indian title "for the purposes and upon the terms" stated in the act; that thereupon all the Chippewas in the State, excepting those on the Red Lake Reservation, should be removed to and take up their residence on the White Earth Reservation and receive allotments in severalty therein, and allotments to those on the Red Lake Reservation should be made in that reservation; that any Indian residing on any of said reservations might, in his discretion, take his allotment "on the reservation where he lives . . . instead of being removed;" that the ceded lands not so allotted should be classified as "pine lands" and as "agricultural lands" and be disposed of in the manner and at the prices stated in the act; and (§ 7) that all moneys accruing from their disposal, after deducting expenses, should be placed in the treasury of the United States to the credit of all the Chippewas of Minnesota as a trust fund, drawing interest at five per cent. per annum, the interest to be used

for their benefit and the principal to be distributed among them at the end of fifty years. In § 6 there was a proviso, deemed important here, declaring "That nothing in this act shall be held to authorize the sale or other disposal under its provision of any tract upon which there is a subsisting, valid, preëmption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the time of its allowance, and if found regular and valid, patents shall issue thereon."

Through negotiations conducted under the authority of that act, the commissioners secured agreements with the Indians embodying the contemplated cessions and relinquishments, and these, upon submission to the President, were approved by him March 4, 1890. The agreement with the Mille Lacs, in addition to embodying a cession and relinquishment of the lands in the White Earth and Red Lake Reservations not required for allotments, contained an express assent to all the provisions of the act of 1889 and an express relinquishment of the lands in the Mille Lac Reservation, as is shown by the following excerpt from the agreement:

"We, the undersigned, being male adult Indians over eighteen years of age of the Mille Lac Band of Chippewas of the Mississippi, occupying and belonging to the Mille Lac Reservation under and by virtue of a clause in the twelfth article of the treaty of May 7, 1864 (13 Stat., p. 693), do hereby certify and declare that we have heard read, interpreted and thoroughly explained to our understanding the act of Congress, approved January 14, 1889, entitled 'An act for the relief and civilization of the Chippewa Indians in the State of Minnesota' (Public, No. 13), which said act is embodied in the foregoing instrument, and after such explanation and understanding, have consented and agreed to said act, and have accepted and ratified the same, and do hereby accept and consent to and ratify the said act, and each and all of the provisions

thereof, . . . and we do also hereby forever relinquish to the United States the right of occupancy on the Mille Lac Reservation, reserved to us by the twelfth article of the treaty of May 7, 1864."

This agreement was negotiated at a council of the Mille Lacs, wherein they reiterated their claim under Article XII and at first declined to assent to the act of 1889, but upon further consideration assented and then signed the agreement. The commission, in reporting the result of its labors, gave a tabulated statement of the reservations, with the area of each, covered by the relinquishments, and included the Mille Lac Reservation, with an area of 61,014 acres, in the statement. In submitting the agreements, including that with the Mille Lacs, to the President, with the recommendation that each be separately approved, as was done, the Secretary of the Interior referred to the prolonged controversy with the Mille Lacs and said: "The rights of the Indians upon this reservation have been a vexed question, full of difficulties and embarrassments, but it is hoped that this agreement will furnish a basis for its early and final solution." Upon approving the agreements (they were sometimes spoken of as constituting in the aggregate a single document) the President transmitted a copy of them and of the accompanying papers to Congress for its information, and in the letter of transmittal said: "Being satisfied from an examination of the papers submitted that the cession and relinquishment by said Chippewa Indians of their title and interest in the lands specified and described in the agreement with the different bands or tribes of Chippewa Indians in the State of Minnesota was obtained in the manner prescribed in the first section of said act, and that more than the requisite number have signed said agreement, I have, as provided by said act, approved the said instruments in writing constituting the agreement entered into by the commissioners with said Indians." Shortly

thereafter, and before the Mille Lacs removed from the old reservation, Congress passed the act of July 22, 1890, 26 Stat. 290, c. 714, whereby a railroad right of way, including station grounds, was granted through that reservation upon condition that compensation therefor be paid to the United States for the use of the Indians and that a failure to use the right of way and station grounds for railroad purposes should inure to the benefit of the Indians, thereby recognizing that the Indians had then come to have an interest in the disposal of the lands.

After the Mille Lacs gave their assent to the act of 1889 the entries theretofore allowed were examined and passed upon by the Land Department in regular course and such as were found to be regular and *bona fide* were passed to patent. The remaining lands in the reservation were subsequently disposed of, not under the act of 1889, but under the general land laws, in pursuance of directions contained in the joint resolutions of December 19, 1893, 28 Stat. 576, and May 27, 1898, 30 Stat. 745.

Whatever might be said of its merits, it is apparent that there was a real controversy between the Mille Lacs and the Government in respect of the rights of the former under Article XII of the treaty of 1864, and that the controversy was still subsisting when the act of 1889 was passed by Congress and assented to by the Indians. And we think it also is apparent that this controversy was intended to be and was thereby adjusted and composed. A manifest purpose of the act was to bring about the removal to the White Earth Reservation of all the scattered bands, residing elsewhere than on the Red Lake Reservation, the Mille Lacs as well as the others; and this was to be accomplished, not through the exertion of the plenary power of Congress, but through negotiations with and the assent of the Indians. The provision in § 6 for perfecting subsisting preëmption and homestead entries, if found regular and valid, pointed most persuasively to a

purpose to extend the negotiations to the Mille Lac Reservation. The commission, the Secretary of the Interior, and the President, in seeking, obtaining and approving the relinquishment of that reservation, all treated it as within the purview of the act, and the Mille Lacs did the same. Then, too, Congress recognized by the act of 1890, shortly following the approval of the agreement, that the Indians had come to have an interest in the disposal of the lands in that reservation.

But while the Government thus waived its earlier position respecting the status of the reservation and consented to recognize the contention of the Indians, this was done upon the express condition, stated in the proviso to § 6, "That nothing in this act shall be held to authorize the sale or other disposal under its provisions of any tract upon which there is a subsisting, valid preëmption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the time of its allowance, and if found regular and valid, patent shall issue thereon." In other words, the controversy was intended to be and was adjusted and composed by concessions on both sides, whereby the lands in the Mille Lac Reservation were put in the same category, and were to be disposed of for the benefit of the Indians in the same manner, as the lands in the other reservations relinquished under the act, but subject to the condition and qualification that all subsisting *bona fide* preëmption and homestead entries should be carried to completion and patent under the regulations and decisions in force at the time of their allowance.

True, it is said on behalf of the Indians that they did not so understand the act, that is, did not understand that existing entries could be thus carried to patent. But of this it is enough to observe that the language of the proviso to § 6 is plain and unambiguous; that the agreement recites that the Mille Lacs "do hereby accept and consent to and

ratify the said act, and each and all of the provisions thereof;" and that the Indians, no less that the United States, are bound by the plain import of the language of the act and the agreement. Not only so, but the act conferred upon the Mille Lacs many very substantial advantages which doubtless constituted the inducement to the adjustment and composition to which they assented. Among other advantages, it enabled them to share in the proceeds of the disposal of a vast acreage of lands in which they otherwise would have had no interest.

On behalf of the Indians it also is said that the proviso was limited to "regular and valid" preëmption and homestead entries, and that no entry of lands within an Indian reservation could come within that limitation. But this assumes the existence of the Mille Lac Reservation at the time of the entries, which was the very matter in dispute. Besides, the interpretation suggested could not be accepted without wholly rejecting the proviso, for if it was inapplicable to entries in the Mille Lac tract, it was equally inapplicable to any in the other tracts relinquished under the act. In saying this we do not indicate that there were other entries, for the reports of the Land and Indian Offices, which were before Congress when the act of 1889 was passed, disclosed the entries in the Mille Lac tract and did not show any others. Of course, the proviso cannot be rejected. It had an office to perform and must be given effect. It meant, as its terms plainly show, that entries made in accordance with existing regulations and decisions could, if *bona fide*, be carried to completion and patent in the usual way; and the phrase "if found regular and valid" was evidently used with special reference to the charge that some of the entries were fraudulent and with the purpose of eliminating such as were of that character.

We are accordingly of opinion that the act of 1889, to which the Indians fully assented, contemplated and

authorized the completion, and the issuing of patents on, all existing preëmption and homestead entries in the Mille Lac tract which in the course of proceedings in the Land Department should be found to be within the terms of the proviso to § 6, and therefore that no rights of the Indians were infringed in so disposing of lands embraced in such entries. And we think the evident purpose of the proviso requires that it be held to include entries of that class theretofore passed to patent, of which there were some instances during the early period of the controversy.

As respects other lands in that tract, that is, such as were not within the terms of the proviso, we are of opinion that they came within the general provisions of the act and were to be disposed of thereunder for the benefit of the Indians, in like manner as were the ceded lands in the other reservations, of which it was said in *Minnesota* v. *Hitchcock*, 185 U. S. 373, 394: "The cession was not to the United States absolutely, but in trust. It was a cession of all of the unallotted lands. The trust was to be executed by the sale of the ceded lands and a deposit of the proceeds in the Treasury of the United States to the credit of the Indians, such sum to draw interest at five per cent."

As before stated, the lands not within the proviso were disposed of, not under the act of 1889, but under the general land laws; not for the benefit of the Indians, but in disregard of their rights. This was clearly in violation of the trust before described, and the Indians are entitled to recover for the resulting loss. In principle it is as if the lands had been disposed of conformably to the act of 1889 and the net proceeds placed in the trust fund created by § 7, and the Government then had used the money, not for the benefit of the Indians, but for some wholly different purpose. That the wrongful disposal was in obedience to directions given in two resolutions of Congress does not make it any the less a violation of the trust. The resolu-

tions, unlike the legislation sustained in *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307, and *Lone Wolf* v. *Hitchcock*, *Id.* 553, 564, 568, were not adopted in the exercise of the administrative power of Congress over the property and affairs of dependent Indian wards, but were intended to assert, and did assert, an unqualified power of disposal over the lands as the absolute property of the Government. Doubtless this was because there was a misapprehension of the true relation of the Government to the lands, but that does not alter the result.

The Court of Claims gave no effect to the proviso to § 6, and the findings afford no basis for separating the damages rightly recoverable from those erroneously assessed on account of lands disposed of under preëmption and homestead entries allowed prior to the act of 1889. The case must therefore be remanded for a reassessment of the damages.

By reason of a contention advanced in the briefs, it is well to observe that the damages should be assessed on the basis of the prices which would have been controlling had the act of 1889 been rightly applied.

The judgment is reversed, and the case is remanded for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE MCKENNA and MR. JUSTICE DAY dissent.